



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

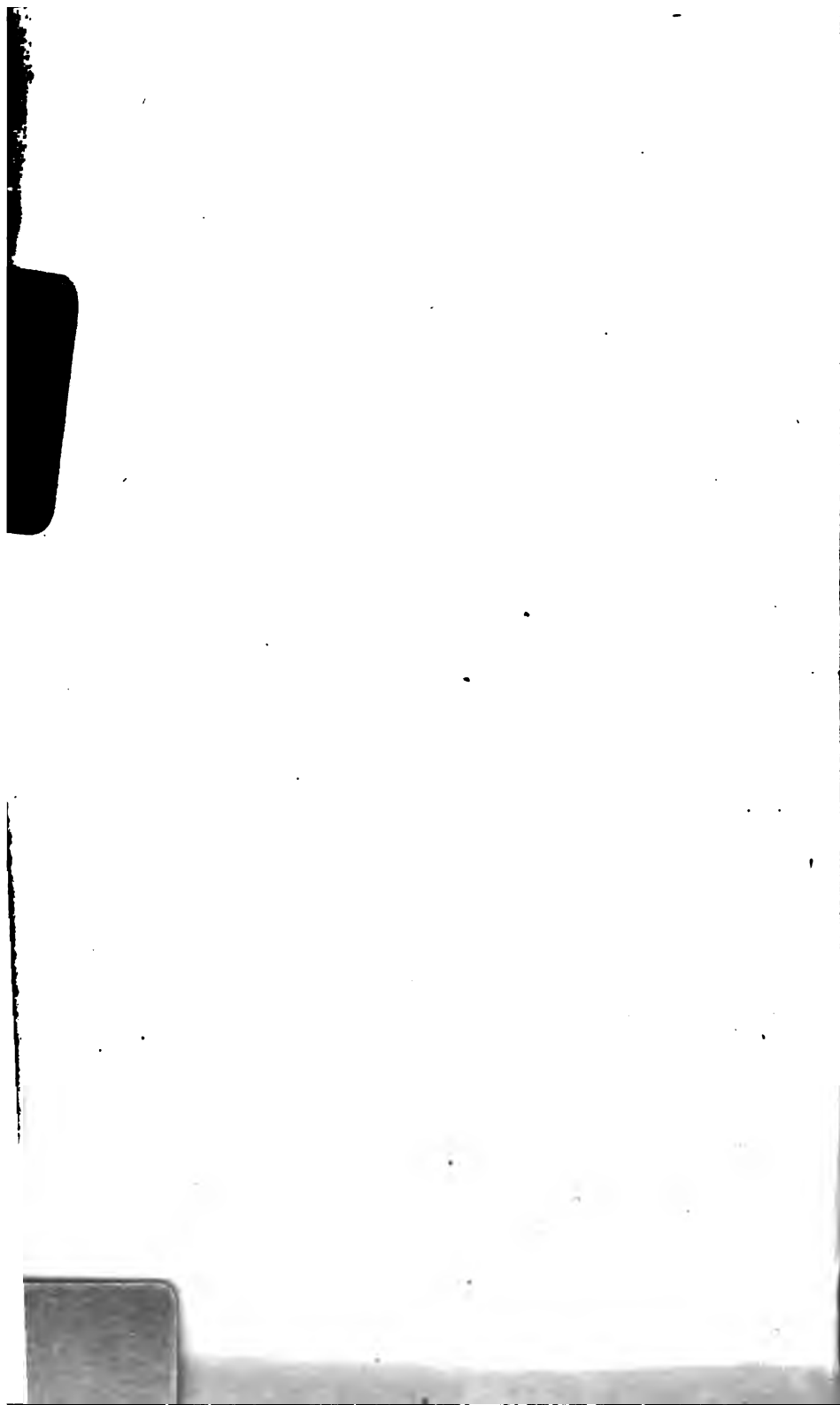
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>







REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. XIII.

Second Edition, with additional Notes and References

NEW YORK:
BANKS & BROTHERS, LAW PUBLISHERS,
No. 144 NASSAU STREET.
ALBANY: 475 BROADWAY.
1864.

57, 439
JUDGES

OF

THE SUPREME COURT OF JUDICATURE

OF

THE STATE OF NEW-YORK,

DURING THE TIME OF

THE THIRTEENTH VOLUME OF THESE REPORTS.

SMITH THOMPSON, Esq., *Chief Justice.*

AMBROSE SPENCER, Esq.

WILLIAM W. VAN NESS, Esq.

JOSEPH C. YATES, Esq.

JONAS PLATT, Esq.

Attorney-General.

MARTIN VAN BUREN, Esq.

SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the thirtieth day of May, in the fortieth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit :

" Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. XIII."

In conformity to the act of Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

THERON RUDD,

Clerk of the Southern District of New-York.

Entered according to Act of Congress, in the year eighteen hundred and fifty-eight

BY BANKS & BROTHERS,

in the Clerk's Office of the District Court of the Southern District of New York.

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THE THIRTEENTH VOLUME.

* * The letter *v.* follows the name of the plaintiff.

Abeel <i>v.</i> Radcliff.....	297	Caines <i>v.</i> Brisban.....	9
Alder <i>v.</i> Griner.....	449	Camp, Jennings <i>v.</i>	94
Aldrich, Jackson, <i>ex dem.</i> Phil- lips, <i>v.</i>	106	Cantine, Labagh <i>v.</i>	272
Angel, Green <i>v.</i>	469	Carpender, Penfield <i>v.</i>	350
Annin <i>v.</i> Chase.....	462	Casborus, People <i>v.</i>	351
Austin <i>v.</i> Hall.....	286	Chapman <i>v.</i> Smith.....	78
		Chase, Annin <i>v.</i>	462
Bailey, Wheeler <i>v.</i>	366	Chipman <i>v.</i> Martin.....	240
Baldwin <i>v.</i> Prouty.....	430	Clayton <i>v.</i> Per Dun.....	218
Bancraft <i>v.</i> Wardwell.....	489	Clow, Jackson, <i>ex dem.</i> Barhydt, <i>v.</i>	157
Barney <i>v.</i> Dewey.....	224	Colden, Monell <i>v.</i>	395
Barnes, Russell <i>v.</i>	156	Cook <i>v.</i> Howard.....	276
Bates <i>v.</i> Shraeder.....	260	Coppernoll, Dygert <i>v.</i>	210
Bathey <i>v.</i> Button.....	187	Crary, Killmer <i>v.</i>	228
Beecker <i>v.</i> Vrooman.....	302	Crawford <i>v.</i> Millsbaugh.....	87
Benedict, Jackson, <i>ex dem.</i> Spen- cer, <i>v.</i>	533	Creal, Jackson, <i>ex dem.</i> Fisher, <i>v.</i>	116
Bennet <i>v.</i> Jenkins.....	50	Cunningham <i>v.</i> Spier.....	392
Berner, People <i>v.</i>	383		
Betsford, Taylor <i>v.</i>	487	Davis, Thompson <i>v.</i>	112
Bigelow <i>v.</i> Johnson.....	428	Davis, Louw <i>v.</i>	227
Bradstreet, Matter of.....	385	Dean, Hall <i>v.</i>	105
Bradley <i>v.</i> Ousterhoudt.....	404	Delancey, Jackson, <i>ex dem.</i> Liv- ingston, <i>v.</i>	537
Bradwell <i>v.</i> Weeks.....	1	De Mott, Utica Bank <i>v.</i>	432
Braman <i>v.</i> Hess.....	52	Denston <i>v.</i> Henderson.....	322
Brandigee <i>v.</i> Hale.....	125	Deridder <i>v.</i> M'Knight.....	294
Breese, Hinman <i>v.</i>	529	Dewey, Osgood <i>v.</i>	240
Briggs <i>v.</i> Hubbard.....	510	——, Barney <i>v.</i>	224
Brinckerhoff, Wheelock <i>v.</i>	481	Dey, Dunham <i>v.</i>	40
Brisban, Caines <i>v.</i>	9	Dodge <i>v.</i> Lean.....	508
Bronson <i>v.</i> Mann.....	460	Dole, Ross <i>v.</i>	326
Brown, Bunting <i>v.</i>	425	Dorr <i>v.</i> Munsell.....	430
Bryan <i>v.</i> Seely.....	123	Driggs, Tiffany <i>v.</i>	252, 253
Bulkley, Wood <i>v.</i>	486	Dubois, Nelson <i>v.</i>	175
Bunting <i>v.</i> Brown.....	425	Duckingfield, Webb <i>v.</i>	390
Burtus <i>v.</i> M'Carty.....	424	Dunham <i>v.</i> Dey.....	40
Bushnell, Jackson, <i>ex dem.</i> Erving, <i>v.</i>	330	Dunlap, People <i>v.</i>	437
Butterworth <i>v.</i> Soper.....	443	Dygert <i>v.</i> Coppernoll.....	210
Button, Bathey <i>v.</i>	187		
		Elmendorf, Van Valkenburgh <i>v.</i> ...	314
		Ellis, Jackson, <i>ex dem.</i> Young, <i>v.</i>	119

Evertson, Ketchum <i>v.</i>	359	Hugarin, M'Lean <i>v.</i>	184
Finney, Wilson <i>v.</i>	358	Hunt, Johnson <i>v.</i>	186
Forbes <i>v.</i> Glashan.....	158	Hull, Schermerhorn <i>v.</i>	270
Fosdick, Wardell <i>v.</i>	325	Ives <i>v.</i> Ives.....	235
Foster <i>v.</i> Garnsey.....	465	Jackson <i>v.</i> Stone.....	447
Gale <i>v.</i> O'Brien.....	189	Jackson, <i>ex dem.</i> Barhydt, <i>v.</i> Clow	157
Garnsey, Foster <i>v.</i>	465	Beekman, <i>v.</i> Haviland.....	229
Gelston, Hoyt <i>v.</i>	139.	Beekman, <i>v.</i> Stevens.....	495
— & Schenck <i>v.</i> Hoyt,....	561	Boyd, <i>v.</i> Lewis.....	504
Genesee Court of Sessions, People <i>v.</i>	85	Carman, <i>v.</i> Roosevelt... 97	
Glashan, Forbes <i>v.</i>	158	Colden, <i>v.</i> Moore.....	513
Godfrey <i>v.</i> Van Cott.....	345	Erving, <i>v.</i> Bushnel.....	330
Goes, Jackson, <i>ex dem.</i> Shultze, <i>v.</i>	518	Fisher, <i>v.</i> Creal.....	116
Gracie <i>v.</i> New-York Ins. Co....	161	Harder, <i>v.</i> Moyer.....	531
Green <i>v.</i> Angel.....	469	Klock, <i>v.</i> Richtmyer.....	367
Griffin, Spafford <i>v.</i>	328	Livingston, <i>v.</i> Hallenbeck.....	499
Grim <i>v.</i> Phoenix Ins. Co.....	451	Livingston, <i>v.</i> Delancey... 537	
Griner, Alder <i>v.</i>	449	Ludlow, <i>v.</i> Sowle.....	336
Guy <i>v.</i> Oakley.....	332	Merritt, <i>v.</i> Terry.....	471
Haight, Johnson <i>v.</i>	470	Phillips, <i>v.</i> Aldrich.....	106
Hall <i>v.</i> Dean.....	105	Potter, <i>v.</i> Leonard.....	180
—, Austin <i>v.</i>	286	Preston, <i>v.</i> Smith.....	406
Hale, Brandigee <i>v.</i>	125	Schenck, <i>v.</i> Wood.....	346
Hallenbeck, Jackson, <i>ex dem.</i> Livingston, <i>v.</i>	499	Spencer, <i>v.</i> Benedict.....	533
Hancock <i>v.</i> Sturges.....	331	Smith, <i>v.</i> Vrooman.....	468
Hand, Palmer <i>v.</i>	434	Schultz, <i>v.</i> Goes.....	518
Hassenfraats <i>v.</i> Kelly.....	466	Stevens, <i>v.</i> Stevens.....	316
Hastings <i>v.</i> Wood.....	482	Van Valkenburgh, <i>v.</i> Van Beuren.....	525
Haywood <i>v.</i> Sheldon.....	88	Watson, <i>v.</i> Smith.....	426
Hazard, Mechanics' Bank <i>v.</i>	353	Whitlock, <i>v.</i> Mills.....	463
Herrick, People <i>v.</i>	82	Young, <i>v.</i> Ellis... 118	
Hillsdale, Overseers of, Shear <i>v.</i> ..	496	Jenkins, Bennet <i>v.</i>	50
Haviland, Jackson, <i>ex dem.</i> Beekman, <i>v.</i>	229	Jennings <i>v.</i> Camp.....	94
Hide, Wylie <i>v.</i>	249	Johnson <i>v.</i> Hunt.....	186
Henderson, Denston <i>v.</i>	322	Haight.....	470
Hess, Brame <i>v.</i>	52	—, Bigelow <i>v.</i>	428
—, Yordan <i>v.</i>	492	Kelly, Hassenfraats <i>v.</i>	466
Heffernan, Mauri <i>v.</i>	58		
Hinman <i>v.</i> Breese.....	529		
Holbrook, People <i>v.</i>	90		
Hopkins, Laurence <i>v.</i>	288		
—, Swift <i>v.</i>	313		
Howard, Cook <i>v.</i>	276		
Hoyt <i>v.</i> Gelston.....	139.		
—, Gelston & Schenck <i>v.</i>	561		
Hubbard, Briggs <i>v.</i>	510		
Hull, Pratt <i>v.</i>	334		
Hudson, Overseers of, <i>v.</i> Taghkanac, Overseers of.....	245		

TABLE OF CASES.

5

Kenny, Lord <i>v.</i>	219	New-York Insurance Company, Gracie <i>v.</i>	161
Kerr <i>v.</i> Shaw.....	236	Niven <i>v.</i> Munn.....	48
Keys, Suydam <i>v.</i>	444	Northrop <i>v.</i> Minturn.....	85
Ketchum <i>v.</i> Everton.....	359		
Killmer <i>v.</i> Crary.....	228		
		Oakley, Guy <i>v.</i>	332
Labagh <i>v.</i> Cantine.....	272	O'Brien, Gale <i>v.</i>	189
Laurence <i>v.</i> Hopkins.....	288	O'Neil, Merritt <i>v.</i>	477
Lawyer, Vrooman <i>v.</i>	339	Ogden, Wilt <i>v.</i>	56
Lawson, Ruggles <i>v.</i>	285	Olmstead <i>v.</i> Stewart.....	238
Lean, Dodge <i>v.</i>	508	Osgood <i>v.</i> Dewey.....	240
Leonard, Jackson, <i>ex dem.</i> Potter, <i>v.</i>	180	Ousterhoudt, Bradley <i>v.</i>	404
Lewis, Jackson, <i>ex dem.</i> Boyd, <i>v.</i>	504	Oyer, Widrig <i>v.</i>	124
Livingston, Winter <i>v.</i>	54		
Lobdell, Union Cotton Manufac- tory <i>v.</i>	462	Packard, Paine <i>v.</i>	174
Louw <i>v.</i> Davis.....	227	Paine <i>v.</i> Parker.....	329
Lord <i>v.</i> Kenny.....	219	— <i>v.</i> Packard.....	174
Lynch <i>v.</i> Mechanics' Bank.....	127	Parker, Paine <i>v.</i>	329
		Palmer <i>v.</i> Hand.....	434
Malcolm, Pratt <i>v.</i>	320	Patterson <i>v.</i> Patterson.....	379
Mancius, M'Elroy <i>v.</i>	121	Pawling <i>v.</i> Wilson.....	132
Mann, Bronson <i>v.</i>	400	Payne, Putnam <i>v.</i>	312
Marshall <i>v.</i> Mott.....	423	Peck, Thorne <i>v.</i>	315
Martin <i>v.</i> Williams.....	264	Penfield <i>v.</i> Carpenter.....	350
— <i>v.</i> Stillwell.....	275	People <i>v.</i> Berner.....	383
—, Chipman <i>v.</i>	240	— <i>v.</i> Casborus.....	351
Mauri <i>v.</i> Heffernan.....	58	— <i>v.</i> Dunlap.....	437
M'Carty, Burtus <i>v.</i>	424	— <i>v.</i> General Sessions of Gen- esee.....	85
M'Elroy <i>v.</i> Mancius.....	121	— <i>v.</i> Herrick.....	82
M'Knight, Deridder <i>v.</i>	294	— <i>v.</i> Holbrook.....	90
M'Lean <i>v.</i> Hugarin.....	134	— <i>v.</i> Nelson.....	340
M'Intyre, Pulver <i>v.</i>	503	Per Dun, Clayton <i>v.</i>	248
M'Instry, Solomons <i>v.</i>	27	Phœnix Ins. Co., Grim <i>v.</i>	451
Mechanics' Bank <i>v.</i> Hazard.....	353	Pierce <i>v.</i> Sheldon.....	491
—, Lynch <i>v.</i>	127	Pratt <i>v.</i> Malcolm.....	320
Merritt <i>v.</i> O'Neil.....	477	— <i>v.</i> Hull.....	334
Merrill, Shepherd <i>v.</i>	475	Prouty, Baldwin <i>v.</i>	430
Mills, Jackson, <i>ex dem.</i> Whitlock, <i>v.</i>	463	Pulver <i>v.</i> M'Intyre.....	503
Millspaugh, Crawford <i>v.</i>	87	Putnam <i>v.</i> Payne.....	312
Muller <i>v.</i> Starks.....	517		
Millon <i>v.</i> Salisbury.....	211	Radcliff, Abeel <i>v.</i>	297
Minturn, Northrop <i>v.</i>	85	Raymond <i>v.</i> Smith.....	329
Moore, Jackson, <i>ex dem.</i> Colden, <i>v.</i>	513	Richtmyer, Jackson, <i>ex dem.</i> Klock, <i>v.</i>	367
Mott, Marshall <i>v.</i>	423	Roosevelt, Jackson, <i>ex dem.</i> Car- man <i>v.</i>	97
Monell <i>v.</i> Colden.....	395	Ross <i>v.</i> Dole.....	326
Moyer, Jackson, <i>ex dem.</i> Harder, <i>v.</i>	531	Ruggles <i>v.</i> Lawson.....	285
Munsell, Dorr <i>v.</i>	430	Rules, General.....	160. 303.
Munn, Niven <i>v.</i>	48	Russel <i>v.</i> Barnes.....	156
Nelson <i>v.</i> Dubois.....	175	Salisbury, Millon <i>v.</i>	211
— <i>v.</i> Swan.....	483	Schenck, Van Brundt <i>v.</i>	414
—, People <i>v.</i>	340	Scidmore <i>v.</i> Smith.....	322
New-York African Society <i>v.</i> Va- rick.....	38		

Schermerhorn v. Hull.....	270	Thorne v. Peck.....	315
Seneca, Overseers of, Tioga Over-		Thorpe v. White.....	53
seers v.....	380	Tiffany v. Driggs.....	252, 253
Scott v. Shaw.....	378	Tioga, Overseers of, v. Seneca	
Seely, Bryan v.....	123	Overseers.....	380
Sharp, Sickles v.....	497	Tomb v. Sherwood.....	289
——, Smith v.....	466		
Shaw v. White.....	179	Union Cotton Manufactory v. Lob-	
——, Kerr v.....	236	dell.....	462
——, Scott v.....	378	Utica Bank v. De Mott.....	432
Sheldon, Pierce v.....	191		
—— v. Sheldon.....	220	Van Buren, Jackson, <i>ex dem.</i> Van	
——, Haywood v.....	88	Valkenburgh, v.....	525
Shepherd v. Merrill.....	475	Van Benschotten, Waterman v..	425
Shear v. Hillsdale Overseers....	496	Van Bergen, Vandenbergh v....	212
Sherwood, Tomb v.....	289	Van Brunt v. Schenck.....	414
Short v. Willson.....	33	Van Cott, Godfrey v.....	345
Shraeder, Bates v.....	260	Vandenbergh v. Van Bergen...	212
Sickles v. Sharp.....	497	Van Valkenburgh v. Elmendorf..	314
Skinner, White v.....	307	—— v. Watson....	480
Slingerland v. Swart.....	255	Varick, New-York African So-	
Sloan v. Wattles.....	158	ciety v.....	38
Smith, Jackson, <i>ex dem.</i> Watson, v.	426	Vrooman v. Lawyer.....	339
Smith, Jackson, <i>ex dem.</i> Preston, v.	406	——, Beecker v.....	302
——, Raymond v.....	329	——, Jackson, <i>ex dem.</i> Smith, v.	488
—— v. Sharp.....	466		
——, Scidmore v.....	322	Waldron, Matter of.....	418
—— v. Ware.....	257	Ware, Smith v.....	257
——, Chapman v.....	78	Waterman v. Van Benschotten..	425
Soper, Butterworth v.....	443	Wattles, Sloan v.....	158
Sowle, Jackson, <i>ex dem.</i> Ludlow, v.	336	Wardell v. Fosdick.....	325
Solomons v. M'Istry.....	27	Wardwell, Bancraft v.....	489
Spafford v. Griffin.....	328	Watts v. Taylor.....	305
Spier, Cunningham v.....	392	Watson, Van Valkenburgh v....	480
Starks, Miller v.....	517	Webb v. Duckingfield.....	390
Stewart, Olmstead v.....	238	Weeks, Bradwell v.....	1
Stevens, Jackson, <i>ex dem.</i> Beek-		Wheelock v. Brinckerhoff.....	481
man v.....	495	White, Shaw v.....	179
——, Jackson, <i>ex dem.</i> Ste-		——, Thorpe v.....	53
vens, v.....	316	Widrig v. Oyer.....	124
Stillwell, Martin v.....	275	Wheeler v. Bailey.....	366
Stone, Jackson v.....	447	White v. Skinner.....	307
Sturges, Hancock v.....	331	Wilson v. Finney.....	358
Swan, Nelson v.....	483	——, Short v.....	33
Swart, Slingerland v.....	255	Williams, Martin v.....	264
Suydam v. Keys.....	444	Wilt v. Ogden.....	56
Swift v. Hopkins.....	313	Wilson, Pawling v.....	192
		Winter v. Livingston.....	54
Taghkanac, Overseers of, Hud-		Wood, Jackson, <i>ex dem.</i> Schenck, v.	346
son v.....	245	—— v. Bulkley.....	486
Taylor v. Betsford.....	487	——, Hastings v.....	482
——, Watts v.....	305	Wylie v. Hide.....	249
Terry, Jackson, <i>ex dem.</i> Merrit v.	471		
Thompson v. Davis.....	112	Yordan v. Hess.....	492

CASES

ARGUED AND DETERMINED

IN THE

Court for the Correction of Errors,

IN THE

STATE OF NEW-YORK,

IN MARCH AND APRIL, 1815.

WILLIAM BRADWELL and JOHN BRADWELL, infants, by THOMAS GIBBONS, their guardian, and BENJAMIN BRADWELL, an infant, by THOMAS GIBBONS, his next friend, appellants,
against
ELIPHALET WEEKS, administrator, &c. of JOHN BRADWELL, deceased, respondent.

THIS was an appeal from the Court of Chancery. *John Bradwell*, the intestate, a native of *England*, residing at *Flushing*, in *Queen's* county, *Long Island*, died, in *August*, 1812, intestate, without issue, leaving a widow, and a clear personal estate, after payment of all debts, &c., of 6,219 dollars and 51 cents.

The intestate had four brothers, named *Benjamin*, *Jonathan*, *Joseph*, and *Peter*; and, in 1802, he removed from *England*, with his brother *Benjamin*, and settled in this state. *Benjamin* died about ten years ago, in the city of *New-York*, leaving three sons, *Benjamin*, *William*, and *John*, natives of this state, appellants in this suit. *Jonathan*, brother of the intestate, died in *England*, in 1802, leaving two children, *Jonathan* and *Ann*, who were still living; and the other brothers of the intestate, *Joseph* and *Peter*, were also still living in *England*.

In *September*, 1812, the respondent took out letters of administration on the estate of the intestate, and paid to the widow of the intestate one moiety of the estate, and to *Gibbons*, the guardian of *William* and *John*, the two sons of the intestate's brother *Benjamin*, deceased, 539 dollars and 30 cents,

Where an alien dies in this state, intestate, without issue, during a war with his native country, leaving personal property, his relations abroad, though next of kin, being alien enemies residing in the country of the enemy, are not entitled to distributive shares of the

[* 2]
property, but the whole will go to his next of kin, resident in this state. (a)
See S. C. contra. (1 Johns. Ch. Rep. 206.)

(a) Vid. *Fairfax's Les. v. Les. of Hunter*, 7 *Cranch*, 603. *Orr v. Hodgson*, 4 *Wheat.* 453. *Blight's Les. v. Rochester*, 7 *Wheat.* 535.

IN ERROR.ALBANY,
March, 1815.BRADWELL
v.
WEEKS.

being two thirds of *one fourth* of the remaining moiety, and was ready to pay the other third of the one fourth, as the share of the other infant son of *Benjamin*, deceased, to any person legally authorized to receive it; but the respondent retained in his hands the other three fourths of the moiety of the intestate's estate, which he insisted he had a legal right to do, to be paid to the two brothers of the intestate, and to the children of the deceased brother, in *England*, and who claimed their distributive shares, as next of kin to the intestate.

The appellants filed their bill in the Court below, against the respondent, as administrator, &c., claiming the whole moiety of the personal estate of the intestate, and insisting that *Joseph* and *Peter*, the brothers of the intestate, in *England*, and the children of *Jonathan*, deceased, also living there, being *alien enemies*, war then existing between *Great Britain* and the *United States*, were incapable of taking under the statute of distributions of this state, and, therefore, not entitled to receive any portion of the intestate's estate.

This cause was heard on the bill and answer, when the Court below pronounced, the 13th of *September*, 1814, the following decree:—"That the plaintiffs' bill be dismissed with costs, to be taxed, to be paid to the defendant by *Thomas Gibbons*, the guardian and next friend of the infant plaintiff," &c. "That the defendant may, if he thinks proper, pay the distributive share of the intestate, which belongs to the infant *Benjamin*, who is without guardian, into the hands of the register or assistant register of the Court, to be by him put out on real security or invested in the *United States* stock, for the benefit of the infant, or his legal representatives, and to abide the further order of the Court respecting the same. And that such payment, to the register or assistant register, shall be a discharge to the defendant of his trust, respecting the said distributive share of the intestate's estate."

[* 3]

*The CHANCELLOR assigned the reasons for his decree, which were the same as those expressed in the judgment of the Court below. (See 1 *Johns. Ch. Rep.* 206.)

Burr, for the appellants. He cited 1 *Bl. Com.* 372. 1 *Hale*, P. C. 95. *Calvin's Case*, 7 *Co.* 33. *Chitty's L. of N.* 2. 2 *Anst.* 263. 2 *Str.* 1082. 1 *Ld. Raym.* 283. *Doug.* 650. *Bynkershoek, Quest. Jur. Pub.* lib. 1. ch. 7.

Riggs, contra. He cited *Parker's Rep.* 267. *Attorney-General v. Wheeden and another.* 1 *Bos. & Pull.* 163. *Sparrenburgh v. Bannatyne.* To show that the bill was defective, as not containing a sufficient allegation of the persons in *England* being *alien enemies*, he cited 2 *Anst.* 462. 543. 2 *Atk.* 397.

YATES, J. The question is, whether the appellants are entitled to a moiety of the intestate's *personal estate*, to the exclu-

sion of two of his brothers, and the children of another deceased brother, who are admitted to be *alien enemies* at the time of the intestate's death.

The principle, that wars ought not to interfere with the *personal* property of an *alien*, in an enemy's country, or with the security and collection of debts, has, in modern times, gained ground in all civilized nations. The latest cases in the *English Courts* concur in the opinion, that the ancient severities of war have been much mitigated by modern usages; this is to be attributed, in a great measure, to the more frequent intercourse between citizens of different nations, by means of commerce, the successful handmaid in securing an interchange of sentiments, whereby more liberal and enlarged views are necessarily introduced, contributing, in a great degree, to soften the estranged and cold feelings of nations towards each other, and thus promoting the security and happiness of individual members of every civilized community. Mankind have a relative connection, and there ever must exist a dependence on each other, to which they are subjected by nature; and although nations may not be in the same situation with individuals, in that respect, yet, when there is an intercourse, they ought to be governed by the same common principles of moral obligation.

In our country, these enlightened and humane principles have *been recognized, as appears by the decision of our Courts, founded on the authority of the common law, and the law of nations. The principle is here well understood, that an enemy, under the protection of our government, can sue and be sued; and that the prohibition to an *alien enemy*, not in the country, to do the same, is temporary, and continues only during the existence of the war; and it is also a doctrine well established in the *English Courts*.

In a late case, in chancery, (*ex parte Boussmaker*, 13 *Vesey*, 71.) Lord *Erskine* declared, that the alien's right of action, in such case, was only suspended by the war; and if the contract was originally good, the remedy would revive on the return of peace.

I shall not controvert the correctness of the principle laid down by Sir *William Blackstone*, in his Commentaries, cited by the appellants; (1 *Black. Com.* 372.) "That alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war;" but, conformably to this doctrine, I think it may well be urged, in this case, that the benefit of the statute of distributions ought to be extended to the kindred of the deceased, notwithstanding their alienage, as a consequence resulting out of privileges granted to the intestate by our government before his death.

It does not appear that *John Bradwell*, the intestate, had become a naturalized citizen of the *United States*, but that he was an *Englishman* by birth; and that he, and his brother *Benjamin*, moved from *England* to the *United States*, in 1802. The inference, therefore, is, that he continued an alien, and that he

IN ERROR.

ALBANY,
March, 1815.BRADWELL
V.
WEEKS

[* 4]

IN ERROR.

ALBANY,
March, 1815.BRADWELL
V.
WEEKS

[* 5]

resided in this country, before the war, as an alien friend, and, afterwards, during the war, as an alien enemy, under the protection of government, and in the enjoyment of privileges guarantied to him by the law of the land. *Vattel* (book iii. ch. iv. sect. 63.) says, "The sovereign declaring war, can neither detain the subjects of the enemy who are within his dominions at the time of the declaration, nor their effects; they came into his country on the public faith. By permitting them to enter his territories, and continue there, he tacitly promised them liberty and security for their return." And in ch. v. sect. 76, in the same book, he says, "War being now carried on with so much moderation and indulgence; safeguards are allowed to houses and lands possessed by foreigners in an enemy's country. For the same reasons, *he who declares war does not confiscate the immovable goods possessed in his country by his enemy's subjects; in permitting them to purchase and possess those goods, he has, in this respect, admitted them into the number of his subjects.

In the case of *Clark v. Morey*, (10 *Johns. Rep.* 72.) it is stated by the Supreme Court, that the evident construction of the act of Congress of the 6th July, 1798, is, that, where an alien comes to reside here during peace, no letters of safe conduct are requisite, nor any license from the president; that the license is implied by the law and the usage of nations; that, if he came here even since the war, a license would be implied, and the protection to him would be continued, until the executive should think proper to order him out of the *United States*.

In this case, it does not appear that the intestate has ever, in any way, been molested by any order of government, but has continued to reside here, by permission, as before stated, until his decease. I can see no reason why the rights he enjoyed, as to the destination of his *personal* property, if he had died during peace, should not (while he thus continued) be secured to him during war. If his relations abroad were entitled to a distributive share in the one case, they are equally entitled in the other. That they would have been permitted to take their shares before the war, in case of his death, will not be questioned. Every member of this Court must know, that the benefit of that rule of law in *England* has frequently been experienced by citizens here. They ought not, perhaps, to be allowed to recover the property while the war continues; and, in that respect, ought to be placed on the footing of an alien enemy, who is a creditor, not resident here, and, consequently, incapable to prosecute for his debts. But the permission given to the alien to remain, must, in case of his decease, during that period, secure to his alien relatives the ability to take, and, on the return of peace, to recover their shares of his *personal* property, according to the statute of distributions, in the same manner as if no war had intervened. This cannot be deemed a violation of the principles laid down in the books, that alien

enemies have no rights, no privileges, unless by special favor of the government of the country ; because it is a consequence necessarily attached to the special favor granted, of remaining in the country during the war.

I am aware that this is extending the consequential right of *protection in time of war further than appears heretofore to have been done ; for, by the books, it is not carried beyond the right of suing for debts ; but it is probable that this question has never been brought up ; I believe no case, to that effect, can be found. It is not unreasonable, therefore, to infer, that no claim like that of the appellants has ever before been interposed.

Admitting, however, for a moment, that this reasoning is not warranted by the facts in the case, because it does not appear, affirmatively and explicitly, that the intestate was an *alien enemy* at the time of his death, nor that he remained here by permission of government, (although there can be no doubt of it, according to the construction given to the act of Congress, in *Clark v. Morey*, before stated,) yet, in order to take a more full and satisfactory view of the subject, I shall proceed to examine the claims of the appellants on the ground urged by their counsel.

It has been stated that the people have no right on the ground of forfeiture, and ought not to interfere with this property, because the claimants abroad, having no privileges, being alien enemies, could not take it.

It must be admitted, that the principles, in relation to *real estate*, as to the alien's taking and holding, until office found, cannot apply to the present case.

An alien can take *personal* property with him, when ordered out of the country ; but the soil is a portion of its dominion, and allegiance to the government, on the part of the owner, cannot be dispensed with ; they are inseparable, and the safety of every community forbids the introduction of a measure which would inevitably give a permanent influence to persons not interested in its destinies.

Blackstone (1 *Bl. Com.* 371.) says, if an alien could acquire a permanent property in lands, he must owe an allegiance equally permanent with that property, which would probably be inconsistent with that which he owes to his own natural liege lord ; besides that, the nation might, in time, be subject to foreign influence.

The property in question is *personal*, and the peculiar situation of it arises out of a state of hostility, and never can enure to the benefit of the appellants, so as to give them the exclusive right to it. The disability (if it exists at all) is created for the advantage and security of the government, who ought, perhaps, *to retain it in the country during the existence of the war. But it is said, the Court, in the decision of this cause, ought to be governed by *policy* ; and the relative situation of the

IN ERROR.

ALBANY,
March, 1815.BRADWELL
V.
WEEKS.

[* 6]

[* 7]

IN ERROR.

ALBANY,
March, 1815.BRADWELL
V.
WEEKS.

claimants has been adverted to, and the exclusive ability of the appellants to render essential services to the country, while in a state of war, has been urged in their favor.

In *Cornu v. Blackburne*, (*Doug.* 641.) Lord Mansfield declared, that it was sound policy, as well as good morality, to keep faith with an enemy in time of war, and that a contract which arises out of a state of hostility, ought to be governed by the law of nations, and the eternal rules of justice.

This, indeed, is not a contract; but, according to the view first taken of the subject, it would be an advantage claimed, in consequence of an implied permission given to the intestate, and could not, according to the rules of justice, be extended to the appellants, nor enforced by the people.

I believe it will be admitted, that the soundest policy of every government, in relation to questions of this kind, is to observe good faith towards foreigners of every description, more especially if they continue their residence, by permission of government, during a war with their country, and not to allow such permission to entrap them, or to produce a disposition of their property different from what would have taken place in a state of peace, and thus suffering manifest injustice to be exercised towards their representatives abroad.

To encourage a foreigner to remain with us in time of peace, with an understanding that, according to the law of nations, in the event of his death, his personal estate shall go to his representatives abroad, although aliens; yet if, unfortunately, a war intervenes, during which he dies, to deprive the same representatives of this property, notwithstanding the permission of government to the intestate to remain in the country until his decease, appears to me to be repugnant to justice and humanity.

It, assuredly, must operate as a direct discouragement to that commercial intercourse, so requisite to promote the happiness and prosperity of our country. According to the view, then, which I have taken of the subject, true policy would lead to a course securing to the *alien* representatives, abroad, the ultimate enjoyment of the *personal* property of their deceased relative.

I am, accordingly, of opinion, that the next of kin of the intestate, residing in *England*, are entitled to their distributive shares *of his personal estate; and that the decree of the Court of Chancery ought to be affirmed.

VAN NESS, J., SPENCER, J., and THOMSON, Ch. J., (PLATT, J., being absent,) declared themselves to be of the same opinion.

P. W. RADCLIFF, STEWART, ATWATER, TIBBITS, VAN SCHOONHOVEN, VANBRYCK, and WENDELL, senators, were also of the same opinion.

ARNOLD, BRICKNELL, BISHOP, BLOODGOOD, BLOOM, CANTINE, CLARK, PRENDERGAST, ROSS, SWIFT, and TABOR, senators, were

of opinion that the decree of the Court of Chancery ought to be reversed. *IN ERROR*

ALBANY,
March, 1815.

CAINES
v.
BRISBAN.

27th March,
1815.

The members of the Court, who were present, being thus equally divided in opinion, the PRESIDENT (*Lieut. Gov. TAYLER*) declared his opinion, that the decree of the Court below ought to be reversed. (a)

It was, thereupon, "ORDERED, ADJUDGED, and DECREED, that the decree of the Court of Chancery be reversed, and that the respondent pay to the appellants 87 dollars and 96 cents, being the amount of costs ordered and decreed by the Court of Chancery to be paid by the appellants to the respondent, and which has been paid accordingly; and that the respondent do account, under oath, before one of the masters of the Court of Chancery for the personal estate of *John Bradwell*, deceased; and that the said respondent be allowed, out of the said estate, the taxable costs of his defence in this suit, in the said Court of Chancery, and on this appeal, and all necessary disbursements by him made prior to the commencement of the said suit; and that he pay over the balance to the appellants, or to the guardians of such of them as may be then under age, in equal proportions; and that the Court of Chancery take all necessary measures for carrying this order into execution," &c.

Judgment of reversal. (b)

(a) *Vid. 5 Wendell, 371.*

(b) The parties who were *aliens*, it is understood, applied to the Circuit Court of the *United States*, and obtained an *injunction* in the cause, before any proceedings were had on the *remitter* to the Court of Chancery, so that the question will, probably, be decided, in the last resort, by the Supreme Court of the *United States*.

*GEORGE CAINES, *plaintiff in error*,
against
JAMES BRISBAN and JOHN BRANNAN, *defendants in error*.

[*9]

GEORGE CAINES, *plaintiff in error*,
against
RICHARD ALSOP and others, *defendants in error*.

IN ERROR, from the Supreme Court.

These were actions of *assumpsit*, in both of which the pleadings were similar, and which were argued together in this Court.

The declarations, in both cases, were for goods sold and delivered, to which the defendant below pleaded,

1. *Non assumpsit*.
2. That the goods, in the declaration mentioned to have been sold to the plaintiff, if any were so sold and delivered, were

In an action of *assumpsit* for goods sold, the defendant pleaded that one A. carried on business under the name of the plaintiff; that the plaintiff, as agent of A., sold the goods:

IN ERROR.

ALBANY,
March, 1815.CAINES
v.

BRISBAN.

as such agent, assigned the debt of the defendant to a creditor of A., and then pleaded a set-off against A.: the plaintiff replied that A. did not, by the plaintiff, sell the goods: the replication was held sufficient.

It seems that a set-off cannot be pleaded, but notice of it must be given under [* 10]

the general issue. (a)

It seems that a set-off is not restricted to the parties on the record; but if the plaintiff be only an agent or trustee, the defendant may set off a debt due from the principal or *cestui que trust*. (b)

A plea, stating that A., the person beneficially interested, being an insolvent, within the act of April, 1811, by the plaintiff, his agent, (under whose name A. sold the goods, to recover the price of which the action was brought,) assigned the debt due from the defendant to B., in preference to the other creditors of A., is bad; such assignment being valid under the statute.

certain law books, and other printed works and publications, and that before, and at the time of the selling and delivery thereof, if any were so sold and delivered, and before, and at the time of making the promises, &c., one *Isaac Riley* carried on the trade and business of a bookseller, by the above plaintiffs, under the name, style, and firm of *Brisban & Brannan*, (*Alsop, Brannan & Alsop*,) but, in truth, for the profit and on account of *Riley*, and at his risk; that whilst *Riley* so carried on the trade of a bookseller, he, by the above plaintiffs, sold and delivered the books; and that after the several supposed assumptions, &c., and before the filing of the bill in this suit, *Riley* was indebted to one *Thomas Fairchild*, or pretended so to be, in some considerable sum of money, and being so indebted, or pretending so to be, *Riley*, by *John Brannan*, his agent, as, and under the name of, acting attorney for the firm of *Brisban & Brannan*, assigned the demand against the defendant to *Thomas Fairchild*, to be collected by *Thomas Fairchild*, in the name of the plaintiffs, but, in truth, for, and on account, and in payment of, the debt due to *Fairchild* from *Riley*, and to enable *Riley*, under the names of the plaintiffs, to receive from the defendant the amount, benefit, and advantage thereof; and that the bill filed in this suit, was filed by *Fairchild*, in the names of the plaintiffs, for the purpose of enabling *Fairchild* to pay and satisfy his demands, or some portion of them, against *Riley*, who is the person that is really, ultimately, and beneficially interested in this suit; and that before the assignment to *Fairchild*, and before filing the bill, *Riley* was indebted to the defendant in a large sum of money, to wit, &c., for work and labor, &c., for money lent and advanced, &c., on an account stated, &c.

3. That after the sale, &c., and promises, &c., *Riley* became solely interested in the whole of the supposed right, title, debt, due or demand of the plaintiffs against the defendant, and being solely interested, he, *Riley*, whilst he continued so solely interested therein, on the 10th of *January*, 1812, became an insolvent debtor, within the true intent and meaning of the act of the 3d of *April*, 1811, entitled "An act for the benefit of insolvent debtors and their creditors." That after *Riley* became insolvent, and before the repeal of the act of the legislature, and whilst *Riley* continued to claim to be so solely interested in the whole of the supposed right, title, debt, due or demand of the plaintiffs, on the 18th of *January* aforesaid, *John Brannan*, one of the plaintiffs, in the character, and by the description, of acting attorney for the firm of *Brisban & Brannan*, the plaintiffs, but, in truth, by the direction, and in the behalf, and on account of *Riley*, assigned the right, &c., to *Fairchild*, to be by him collected in the names of the plaintiffs, but, in

(a) Vid. *Budge v. Johnson*, 5 *Wendell's Rep.* 342. *Wheeler v. Raymond*, 5 *Cov. Rep.* 231. S. C. 9 *Ibid.* 295. *Williams v. Crary*, 5 *Ibid.* 368.

(b) But see *Toland v. Murray*, 18 *Johns. Rep.* 24. *Guy v. Oakley*, *infra*, 332. *Murray v. Toland*, 3 *Johns. Ch. Rep.* 569.

truth, on account of *Riley*, and in part payment and satisfaction, when collected, of a debt, or pretended debt, due from *Riley* to *Fairchild*; and that it was so made to pay a debt due to *Fairchild*, in preference to other debts due from *Riley*, and in contemplation of applying for the benefit of the act, when he was an insolvent debtor within the true intent and meaning thereof, and with intent to defraud his other creditors, of which *Fairchild* had notice, he, *Fairchild*, not being a creditor who had, before the passing of the act, imprisoned, impleaded, or prosecuted *Riley*, on any civil process issuing out of any Court within and under the authority of this state, for debt, or any contract express or implied; that, after the assignment, *Riley*, according to due form of law, at *Flatbush*, in the county of *King's*, presented a petition to *William Furman*, first judge of the Court of Common Pleas of that *county, praying that his estate might be assigned, and he discharged from his debts, according to the provisions of the act of the 3d of *April*, 1811: whereupon such proceedings were had, that the estate of *Riley* was, in due form of law, assigned to certain assignees, and all the right of the plaintiffs, and of *Riley*, in the supposed debt against the defendant, became vested in law in his assignees; and *William Furman*, by a discharge under his hand and seal, bearing date the 1st of *May*, 1812, discharged *Riley* from all his debts; and that the bill filed in this suit was filed by *Fairchild*, in the name of the plaintiffs, to enable *Fairchild* to collect the supposed debt, and apply the same in paying and satisfying the debt of *Riley* to *Fairchild*, in preference to the other creditors of *Riley*.

To the second plea the plaintiffs replied, that *Isaac Riley* did not, by the plaintiffs, under their name, style, and firm, or otherwise, howsoever, sell and deliver to the defendant the goods, books, &c., in manner and form, &c.

To this replication the defendant below demurred, and assigned for causes: 1. That the replication does not traverse, or confess and avoid the matter alleged in the plea, nor answer it but by way of inference and argument only. 2. Because the matter set forth in the replication is matter of evidence, and no material issue can be taken thereto. The plaintiffs below joined in demurrer.

The plaintiffs below demurred, generally, to the third plea; and the defendant joined in demurrer. The Court below gave judgment for the plaintiffs below on both demurrers, and the issue on the first plea having been tried, the jury gave a verdict for the plaintiffs below, and final judgment was entered thereon in the usual form.

[See the decision of the Supreme Court, and the reasons assigned, in 10 *Johns. Rep.* 45. 396.]

The following are the reasons offered by the plaintiff in error for reversing the judgment:—

1. Because, by the common law, assignments of debts, or

IN ERROR.

ALBANY,
March, 1815.

CAINES
v.
BRISBAN

[* 11]

IN ERROR.

ALBANY,
March, 1815.CAINES
V.
BRISBAN.

[* 12]

chooses in action, are not permitted, and are recognized at law only to avoid sending the assignee into equity ; in consequence of this, assignment of debts, as being mere equities, are, when recognized by law, governed by equitable principles. By these principles, notice to the debtor is indispensable, to take away from him any of his rights against his creditor, the assignor. *By the same principle, until notice of the assignment of a debt is given to the debtor, it is, as to him, as if it had never been made ; and, until the time of notice given, he deals with his creditor on the same terms and footing as if there were no assignment ; that the consequence of this is, that the debtor's right of setting off the amount of any credits given by him to his creditor, continues to the time of *notice of the assignment*, and is not regulated, or governed, by the time of the assignment made, (or its date,) but by the time of the *notice of assignment given to him*.

2. Because, by the first decision of the Supreme Court, the right of set-off, which a debtor has, under the statute, against his creditor, will be taken away by a secret assignment of his debt, without notice, when he may have been dealing with his creditor, on the *faith of paying that very debt*, and without which faith he would not have dealt at all.

3. Because, by the same decision, a wide door is opened to fraud and deceit, especially in cases of insolvency, like those before the Court ; for a trader, particularly, might, (if a secret assignment of a debt, without notice, be good against the set-off of subsequent creditors,) by assigning the debts due to him as soon as contracted, receive payment of the whole from his unsuspecting debtor, who might be obliged to pay the same debt over again to the assignee, and then have to look for his own money under an insolvency of sixpence in the pound.

4. Because, by the same decision, a host of cases, which have long been considered as the landmarks of trade, will be overturned, and the whole system of commercial dealing be shook to its very basis.

5. Because, by the first principle of the second decision of the Supreme Court, against a debt contracted through the medium of a factor, who has no claim on the money, a right of set-off against the principal seems to be denied, though such principal may owe the defendant ten times the amount ; and this merely because a factor may sue in his own name for account of his principal.

6. Because, under that part of the decision of the Supreme Court, any man who chooses to trade through the medium of a factor, or agent, might, by bringing his actions in the name of the agent, render the whole statute of set-off a dead letter.

7. Because the Supreme Court have given, as a reason for *their second judgment, a fact which was immaterial to the issue, and which, by their first judgment in the above causes, they determined to be so

[* 13]

8. Because, by the second decision of the Supreme Court, it appears that *trusts* have been confounded with the *uses* on which they are held, and a transfer of the *use* being supposed to create a complication of the *trust*, making thereby a complication of a trust depend, not on a diversity of interest, but a change of parties.

IN ERROR

ALBANY,
March, 1815.CAINES
V.
BRISBAN.

9. Because, by the second decision of the Supreme Court, the right of set-off is construed to exist only between parties to the record, the necessary result of which must be, that either an assignment of a debt, or a contract made through an agent, though for the benefit of another, would destroy the effect of the act; and, thus, a statute formed on equitable principles be made to operate against equity.

10. Because, by the second decision of the Supreme Court, it appears, that though the construction of the statute, objected to in the last and ninth reason, should be relaxed, and a set-off admitted in favor of *c'estui que trusts*, still such set-off must, by the judgment of the Court, be limited to cases where the set-off is less, or equal to the amount of the debt demanded, and will not extend to cases where the set-off is of a larger sum than the debt claimed; from whence this incongruity will follow, that a payment may be made with a small sum which cannot be made with a larger; or, in other words, that, against a demand for 100 dollars, a set-off of 100 dollars will be a good bar to a recovery, but a set-off of 150 dollars will not.

11. Because, under the same decision, the remedial act for the amendment of the law is construed strictly, not according to its spirit, but its letter, and the particular relief, afforded by the first section, is made to destroy the general relief afforded by the tenth; and thus to operate as a *virtual* repeal, in a *particular* instance, of a *subsequent* clause of the same act, by which a general and universal right is given in *all* instances.

12. Because, under the second decision of the Supreme Court, where a suit must, in order to satisfy the forms of law, necessarily be in the names of the plaintiffs, a defendant cannot show in whom the right to the subject matter of the suit is, in bar to an action prosecuted on account of a person who has no *right; and thus the recovery will be controlled by the names of the parties, and not by their rights, as shown on the record.

[* 14]

13. Because, under the second decision of the Supreme Court, in cases of insolvency or bankruptcy, where, by the statute giving relief, the assignees are not authorized to sue in their own names, their legal right to the debts assigned can never be pleaded as a bar to a recovery on an assignment made in fraud of their rights, under the statute; the result of which would necessarily be, that a colluding creditor might recover the whole of the insolvent's debts, and, under the judgment of a Court of law, put them into the hands of the insolvent himself, against his own assignees, under the statute, who would have no remedy but by a suit in equity against the insolvent.

IN ERROR.

ALBANY,
March, 1815.

CAINES
v.
BRISBAN.

14. Because, under the insolvent act of *April*, 1811, all suits by the assignees, for the real and personal estate of the insolvent, must be in their names; therefore the second decision of the Supreme Court is, in that point, erroneous in its very foundation.

15. Because, under the insolvent act of *April*, 1811, assignments made by debtors, who become insolvent, within the meaning of that statute, after its passing are prohibited and declared fraudulent, and are therefore void by operation of law; yet, according to the decision of the Supreme Court, assignments thus made against law, are a good basis on which to ground a recovery at law; contrary to the maxim of *ex dolo malo non oritur actio*, that is, a fraudulent act can never give a right of action.

The following reasons were offered by the defendants in error for affirming the judgment:—

As to the second plea,

1. Because the replication is a full and sufficient answer to the plea. The defendant pleads, that *Isaac Riley* was indebted to him in a sum exceeding the plaintiff's demand; and that *Riley* carried on business by the plaintiffs, in their partnership name, and by them sold the goods for which the suit is brought to the defendant. Now, the whole ground of the claim to set-off comes from the alleged fact, that *Riley*, though under the name of another, was, in truth, the vendor of the goods, and that, therefore, it was a case of mutual indebtedness between him and the defendant. The plaintiffs traverse the fact, that *Riley*, by the plaintiffs, or otherwise, sold the *goods; and whatever might be the indebtedness of *Riley* to the defendant, it is manifest that that cannot be the subject of set-off against the plaintiff's demand, unless they acted for, or on behalf of *Riley*. The very allegation, then, upon which the whole claim to set-off rested, is directly and distinctly denied in as broad terms as it is alleged; and this is consistent with the known and established rules of pleading. The replication may at once deny the particular fact intended to be put in issue, and conclude to the country.

2. The plea is, also, in itself a nullity. At common law, debts could not be set off, but the party was put to his cross action. Our act, which has varied the common law, allows the defendant to plead the general issue, and give notice of the matter he intends to set off. It is a rule, that where a statute gives a remedy, not known to the common law, that remedy alone can be pursued. In this case the rule should be rigidly inferred. The remedy given is simple and inartificial, calculated to expedite justice, and to rescue parties from the labyrinth of legal subtleties and forms.

3. But even admitting that *Riley* was a *cestui que trust*, for whose use the goods were sold, yet a Court of law cannot recognize and settle such interfering and complicated trusts as are unfolded by this plea. The plaintiffs having openly acted

as the owners in the sale of the goods, the promise enured to them, and they can rightfully maintain the action in their names. *Riley*, at most, then, had only an equitable interest; the legal title was in them; and they, by the direction of the *cestui que trust*, have assigned the demand to *Fairchild* for a *bona fide* consideration. A Court of law is incompetent, from its constitution, to prove the nature of their respective rights.

4. It is not a suit in which our statute authorizes a set-off, which applies to the case where two or more persons, having dealings together, are indebted to each other, and one brings a suit against the other. The plea discloses no mutual dealings between the plaintiff and defendant. There never was a time when the plaintiff could, at law, have availed himself of this asserted set-off. The original contract was between other parties, and the plaintiff in this suit was never indebted to the defendant. No balance could be certified against them in favor of the defendant.

As to the third plea,

*1. This plea proceeds upon the ground, that *Riley* was fairly indebted to *Fairchild*, and that the assignment from the plaintiffs, to secure that debt, while *Riley* contemplated taking the benefit of the insolvent law, of the 3d of *April*, 1811, was void, as giving him an unjust preference over other creditors. At common law such assignment is clearly valid; for one creditor has a right, if he can, to obtain payment or security, in preference to another. *Vigilantibus non dormientibus subvenit lex*. If the assignment is invalid, it must be made so by the act. Now, the act does not invalidate the assignment; it merely provides, that if the debtor, after being prosecuted or imprisoned, shall give such preference, *he* shall not be entitled to the benefit of the act. It is an objection to the discharge of the debtor, not to the validity of the assignment. It is directly the converse of the provisions of the *English* bankrupt laws, by which the bankrupt is discharged, but the assignment avoided.

2. But even if such assignments were, by the general provisions of the act, invalidated, yet this plea is wholly defective, in not stating that *Riley* was prosecuted after the passing of the act, and made the assignment after the prosecution. On the contrary, it is expressly averred, that he was prosecuted by *Fairchild*, and it is no where alleged that he was prosecuted by any one else. To bring the case within any of the provisions of the act, even as an objection to the intended application of *Riley* for a discharge, it was necessary to allege that a preference was given, not only after a suit commenced, but that such suit was, in fact, commenced after the passing of the act. This results expressly from the last proviso of the first section.

3. But independently of these grounds, the defence in the plea is utterly untenable on any principle. The defendant admits the debt, and the plaintiffs are the only persons in law

IN ERROR.

ALBANY,
March, 1816.

CAINES

BRI. v.

[* 16]

IN ERROR.

ALBANY,
March, 1816.CAINES
v.
BRISBAN.

recognized as capable of recovering. The asserted fraud on *Riley's* creditors cannot release the defendant from *his* liability. Whether the plaintiffs, after recovery, would hold the money in trust for *Fairchild*, or for *Riley's* creditors, is a question between them, which the defendant is neither bound nor admitted to litigate. It is not pretended that the assignees have ever interposed, or forbid payment to the plaintiffs or *Fairchild*.

[* 17]

Caines, for the plaintiff in error. The principle of the decision *of the Supreme Court, in the case in 10 *Johns. Rep.* 46., (*Brisban & Brannan v. Caines*.) is, that a secret assignment of a debt deprives the debtor of his right of set-off. That position is erroneous: that the assignment may produce such an effect, it is necessary that it should be accompanied with notice; and the assignment is valid, in respect of the debtor, not from the day of the assignment, but from the time that notice was given. The date of the assignment is altogether immaterial. Here, the plaintiff in error never had notice; his right of set-off, therefore, continued unimpaired.

The replication of the plaintiffs below is bad: it is argumentative, does not answer the plea, is a negative pregnant, and tenders an immaterial issue.

In the second case, (10 *Johns. Rep.* 396.) the Supreme Court put their decision upon an objection that never was made; it was not contended that the agent could not bring the suit, but it is admitted that either principal or agent might have brought it. They say, too, that the trust is "interfering and complicated;" but it is contended that it is a simple trust, and that *Riley*, and not *Fairchild*, is the *cestui que trust*. But, admitting that *Fairchild* were the party beneficially interested, still the set-off would be good for want of notice.† A set-off must be allowed wherever a cross action could be brought, for a set-off is in the nature of a cross action;‡ and, if *Fairchild* had an interest, it should be allowed, in order to prevent a suit in equity.§ The Court say, that the statute of set-off refers merely to the parties on record; but it is contended, that it is unimportant who are the parties to the record: we are to look merely to the persons beneficially interested.|| It is no objection, as it was considered by the Court below, that the plea shows a demand larger than the one declared for, and that the plaintiffs to the record owe nothing.¶ Nor is it an objection that the set-off was pleaded. By the first section of the act for the amendment of the law, a set-off is made a defence, and by the 10th section a defendant may plead as many several matters as he may think necessary to his defence. By the ten pound act, the defendant is allowed to plead or give notice of a set-off. Where a larger sum is due from the plaintiff, it is more proper to plead than to give notice.†† But supposing the plea to be bad, the plaintiffs have made it good, by replying, without objecting to the matter of form, by special demurrer.

† 5 *Johns. Rep.*
105. 8 *Johns.*
Rep. 152.

‡ *Bull. N. P.*
179.

§ 4 *Ves. jun.*
118. 2 *Hurr.*
826. 8 *Johns.*
Rep. 156.

|| 1 *Term Rep.*
622, 623. 1
Johns. Cas. 54.
Tuttle v. Bebee,
8 *Johns. Rep.*
152.

¶ *Ruggles v.*
Keeler, 5 *Johns.*
Rep. 263.

†† *Tidd.* 606.

As to *Fairchild's* interest, it appears, from *the pleadings, that he only had an authority to collect, and nothing more.

As to the second plea in bar; that plea states an assignment by *Riley* to *Fairchild*, in preference to his other creditors. It is a principle applicable to the insolvent act of 1811, that after the passing of that law, if any one should become an insolvent under the act, he cannot, after becoming such insolvent, assign or distribute any of his property. One object of this statute is to prevent fraud; it should, therefore, be construed liberally. The statute itself, in the 1st section, prohibits this very act: it compels the debtor to swear that he has not made any preference among his creditors, or any preferential assignment of his property after he had become insolvent. Every penalty in a law implies a prohibition,† and, in the 7th section of the act, there is a penalty imposed on preferential assignments. This assignment was made by *Riley* subsequent to his becoming an insolvent.

The suit was not brought, as is asserted by the Court below, in the names of the right persons, but should have been in the names of *Riley's* assignees. By the common law, *choses in action* could not be assigned, but the act enables assignees to collect debts in their own names. A plaintiff must show that the debt which he demands is not only due from the defendant, but is due to himself; and the demurrer to this plea confesses that the debt was due to *Riley*.‡ After the assignment of *Riley's* estate, the defendant could pay the debt to no other than *Riley's* assignees: of this assignment he had complete notice, previous to the commencement of the suit, for a newspaper notice is a sufficient notice under the statute. Had the defendant paid the money, after notice, to the insolvent, it would have been in his own wrong, and would have been no defence in an action by *Riley's* assignees.§

Henry, for the defendants in error. The principles contended for on the opposite side, are not disputed: it is only necessary to show that they do not apply to this case. From the plea, it appears that the defendant dealt with the plaintiffs as principals; that the debt was assigned to *Fairchild*, for a fair and valuable consideration, to pay a debt due from *Fairchild* to *Riley*, and that *Fairchild* was not a mere agent or attorney to *collect the money. In the replication, it is denied that the plaintiffs were agents.

Under the second plea, the defendant could not avail himself of the set-off: a set-off can only be between persons dealing together, and mutually indebted; and there must not only be mutuality of indebtedness, but an individuality.|| The Supreme Court says, "You shall not impair the right of a third person by this set-off:" they say, "You shall not impair the right of the factor by this set-off, neither will we hear it, because it will draw into examination the accounts of the factor."¶ *Fairchild*

IN ERROR.

ALBANY,
March, 1815.CAINES
V.
BRISBAN† *Cartl.* 252.
Rep. 60.‡ *Bac. Abr.*
Pleas & Plead.
ings. *Hob.* 104.
Vaugh. 8. 58
Co. Lit. 235.§ 1 Term
Rep. 62. 12
East, 656.

[* 19]

|| *Montague*
on Set-off, 23¶ *Cowp.* 251
Montague
on Set-off, 33.

IN ERROR.

ALBANY
March, 1815.CAINES
v.
BRISBAN.

claims under the assignment which was made for a good consideration. Mr. *Caines* asserts, that *Riley* was the person really interested: now, how are the rights of *Fairchild* to be tried? Can the Court award an interpleader? Or would they examine into these complicated trusts, on affidavits?

The Court below considered the plea bad, because it was a special plea in bar, and not the general issue, with notice. The right of set-off was not given by the common law, but was introduced by statute, and the statute having prescribed the mode in which a party may avail himself of his set-off, he can resort to no other. This was, no doubt, intended by the legislature to save costs, and to avoid the intricacy and expense of special pleading. The 10th section of the act, for the amendment of the law, relied on by the opposite counsel, does not vary the form; that section merely gives a defendant the right of multiplying his grounds of defence.

It is said, that the replication to the plea made it good: it is true that a plea, defective in matter of form, is cured by the replication; but here the plea is defective in substance. It is not insisted that a set-off is admissible only between parties to the record; but the main fact alleged in the plea is, that the plaintiffs sold as factors, and not as principals: the replication denies this allegation, and takes an issue upon the very foundation of the equity on which the defendant rested.

As to the second special plea, it will appear, upon examination, that there is an acknowledgment of a debt due from *Riley* to *Fairchild*; of course, that there was a consideration for the assignment; but that *Fairchild* was preferred to the other creditors. The *English* bankrupt law, it is true, would render such a preference void, but under the insolvent act of 1811, it is valid as to the creditor preferred, and the whole penalty rests upon the insolvent, by precluding him from the benefit of the act. There was, then, a perfect right vested in *Fairchild*, of which the act never intended to divest him. There is no intimation, in any part of the plea, that *Riley* was either prosecuted or imprisoned; therefore, the plea is defective in substance, under the statute. It was urged, on the other side, that the 7th section of the act imposed a penalty upon those who took advantage of the preference; but that refers to trusts, and not to assignments for the payment of debts. The plea is also bad, because it does not appear to whom the assignment was made.

It was contended, also, on the other side, that *Riley's* equitable interest passed to his assignees; and that they might have sued in their own names. This is denied: the assignees would have no other right than what the insolvent himself possessed. Suppose the insolvent were the assignee of a bond, or a *certain que trust*; his assignees could not bring an action in their own names, but could have the same rights only, to recover the debt, as the insolvent had.† The action was properly brought in the

name of the present plaintiffs; and, as was said by the Supreme Court, the claim of *Fairchild*, on the one hand, and of the assignees of *Riley*, on the other, cannot be tried in this suit. Suppose the money were to be brought into Court; would the Supreme Court put the assignees of the insolvent, and the holder of the chose in action, upon their trial by affidavits?

IN ERROR

ALBANY,
March, 1815.CAINES
V.
BRISBAN.

Caines, in reply, denied that the defendant below dealt with the plaintiffs as principals; the very words of the plea show that the plaintiffs were mere agents. The individuality and mutuality of the parties, therefore, existed; for the parties were the defendant and *Riley*, who was the only person interested before the assignment to *Fairchild*; and it does not appear, from the pleadings, that the plaintiffs had any lien upon the goods or debts of *Riley*. In answer to the objection, that the plea does not state that *Riley* was prosecuted or imprisoned before the assignment to *Fairchild*, he said, that it was stated that, on such a day, *Riley* became an insolvent, within the intent and meaning of the act, and, also, that the assignment was made on a day after that on which he became an insolvent.

CANTINE, senator. The plaintiff in error claims to have the judgment of the Supreme Court, in this cause, reversed, on the ground that both his special pleas, in bar, are good, and well pleaded; and that the replication of the defendants in error, to the first special plea, is bad; because it traverses what is merely matter of inducement; that it tenders an immaterial issue; and is argumentative.

The Supreme Court determined that both pleas were bad, and on that determination their judgment is founded; on the sufficiency, or insufficiency, of the replication they gave no direct opinion.

Though I cannot subscribe to the correctness of all the reasoning of the Court, in support of their judgment, yet, from the view I have taken of the subject, my mind has been brought to a conclusion in favor of its affirmance.

There appears no good reason against the right of set-off in this cause, if the plaintiff in error can avail himself of that right, under a special plea of set-off. The statute allows a set-off where "two or more persons, dealing together, are indebted to each other, or have demands arising on contract, or credits, against each other." Assuming for a fact, what the plaintiff in error averred in his plea, that the goods were sold to him by *Riley*, through his agents, *Brisban & Brannan*, for the profit and account of the said *Riley*, and at his risk, it is, manifestly, a dealing together, between *Riley* and the plaintiff in error within the very words of the act.

This suit might have been brought in the name of *Riley*, as well as in the name of the present defendants in error; and, in

[* 21]

IN ERROR.

ALBANY
March, 1815.CAINES
V.
BRISBAN.

[* 22]

such case, no one would have pretended to controvert the plaintiff's right of set-off: has, then, that right been impaired by the assignment to *Fairchild*, or by the circumstance of the suits being brought in the name of *Brisban & Brannan*, the agents of *Riley*? I think not; this case presents no interfering, or complicated trusts; but a simple and direct transmission of interest from one to another, making only a change of parties to the same interest. The assignment to *Fairchild* could not at all affect the rights which the plaintiff in error had previously acquired: he took, subject to the equities between the original parties: it would be in the highest degree unjust, and would render the statute of set-off a dead letter, to permit a creditor to deprive his debtor of his right of set-off by a transfer of his demand to a third person: the Supreme Court have uniformly taken cognizance *of the assignment of choses in action, to avoid driving parties into a Court of equity. In the case of *Andrews v. Becker*, (1 Johns. Cas. 411.) the defendant pleaded a release of the action from the plaintiff on the record: to this there was a replication, stating that the bond, on which the suit was brought, had been assigned to *Adams & Parish*, of which the defendant had notice: this replication was held to be good, and the interest of the assignees protected: the same principle is recognized and fully established in a number of subsequent decisions. (*Wardell v. Eden*, 2 Johns. Cas. 121. S. C. 1 Johns. Rep. 531. *Littlefield v. Storey*, 3 Johns. Cas. 425.)

These decisions are certainly agreeable to equity and common sense; but upon the same principles, and for the same reasons, are we also bound to protect defendants in their right of set-off, acquired before a transfer of interest by the plaintiffs on record.

To limit the right of set-off to the parties to the record, would greatly narrow down the beneficial operation of the statute. The former decisions of the Supreme Court have been uniformly in favor of extending the benefit of this statute to the parties in interest, though not parties to the record. In the case of *Johnson v. Bloodgood*, (1 Johns. Cas. 51.) the Court decided, that they would protect the interest of the *cestui que trust* against a set-off, which would have been good against the plaintiff on the record, had the interest remained in him. The same principle is contained in the case of *Littlefield v. Storey*, (3 Johns. Cas. 425.) The case of *Ruggles v. Keeler* (3 Johns. Cas. 263.) is analogous to the present: the Court there permitted the defendant to set off a demand against one *Walker Lewis*, in bar of the plaintiff's right of action, on the ground of *Lewis's* being the party in interest, *Ruggles* having assigned the demand to him. And in the case of *Tuttle v. Beebe*, (8 Johns. Rep. 152.) the Court permitted the defendant to set off bonds, which had been assigned to him by third persons, against the plaintiff. From these decisions, it is manifest that the Supreme Court, in regulating the right of set-off,

have always had regard to parties in interest, though not parties to the record. On the argument in this Court, it was contended, in behalf of the defendants in error, that, being factors of *Riley*, they had a right to bring the suit in their names, and to retain, in their own hands, whatever might be due them from *Riley*, as having a legal lien *on those demands to satisfy themselves first; and, in support of this principle, they cited *Drinkwater v. Goodwin*, (*Cowper*, 255.) and insisted that the plaintiff could not, therefore, set off, in this suit, his demand against *Riley*.

It is not necessary to deny that, as factors, they had a lien on this demand for what *Riley* might owe them. To controvert the correctness of the conclusion, that the plaintiff's right of set-off was thereby destroyed, let it be conceded, that if *Riley* had been indebted to them at the time when the goods were purchased, or prior to the time when the plaintiff in error acquired any right of set-off, that their lien would have had the preference of the plaintiff's set-off; it does not follow, that if such lien did not exist, the plaintiff would still be deprived of a right of set-off. The case of *Drinkwater v. Goodwin* is not analogous to the present case; there the defendant claimed the benefit of a payment to the factor of *Drinkwater*, and showed affirmatively that the factor was a creditor, having a lien on the demand in controversy. In this case it appears affirmatively that the factors have no lien; because, as agents of *Riley*, they have assigned the demand to *Fairchild*, for his use and benefit alone, and to secure to him the payment of a demand he had against *Riley*. The assignment, in this case, must, therefore, be considered in the same light as one made immediately by *Riley* to *Fairchild*, and in which the defendants in error have no sort of interest whatever.

The next inquiry is, Could the plaintiff in error plead his set-off specially in bar of this action; or should he have pleaded the general issue, and given notice of it, as the act directs? The remedy by set-off is a creature of the statute; it did not exist at common law; the plaintiff in error was bound, therefore, to confine himself to the remedy as appointed by the statute. The Supreme Court, in the case of *Tuttle v. Beebe*, before cited, say that this statute must be liberally expounded. It is undoubtedly proper, and for the advancement of justice, that it should be so construed; but there is certainly a wide difference between a liberal construction of a statute, and a total departure from its provisions. A strict construction of the act would limit the right of set-off to the parties to the record; but to answer its beneficial purposes, it is necessary to extend that right to the parties in interest, though not parties to the record. Again; the act directs that, where the plaintiff is overpaid, the jury *shall* find a verdict for *the defendant, and certify the amount due from the plaintiff, &c. A strict and literal construction of this branch of the statute would produce the difficulty suggested by the Supreme Court in their decision of this cause. A liberal construction would

IN ERROR.

ALBANY,
March, 1815.CAINES
v.
BRISBAN.

[* 23]

[* 24]

IV ERROR.

ALBANY,
March, 1815.

CAINES
v.
BRISBAN.

permit the defendant to set off as much as was necessary to protect himself against the claim of the party in interest; not to the record; and yet the remedy appointed would be pursued, because exactly in the form prescribed by the act; there is no good reason to suffer a departure from the form prescribed; it is not at all necessary to promote the ends of justice. This form was undoubtedly appointed to facilitate legal proceedings, and to disencumber them from the intricacies of special pleading; and it affords as ample and perfect relief as can possibly be had by means of a plea of set-off. If it had not been intended to confine a party to the form prescribed, the provision would have been, in the alternative, that he might plead his set-off specially, or plead the general issue, with notice of it. This appears manifest from the consideration that our statute is taken from one of *Geo. II.*, on this subject, in which the remedy, by set-off, is thus given in the alternative.

In 1 *Saunders*, 136. (note 4.) *Sergeant Williams*, in speaking of remedies given by statute, says, "The distinction seems to be this; where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued, and no other." And in the case of *Miller v. Taylor*, (4 *Burr*. 2406.) this rule was considered as applicable to civil cases.

A subsequent section of the same act gives to a party a right to plead as many several matters as he shall think necessary for his defence; and it was strongly urged, that a just and liberal construction of this section gives the right to plead a set-off specially. What was the object of that section of the act? What was the relief intended to be granted? It was to remove a difficulty which existed at common law. Before this act a party was not permitted to plead different defences to the same action. But it is not necessary to permit a set-off to be pleaded, specially, to carry the objects of this section into full and entire effect; every benefit intended to be secured by it, is equally attainable by a plea of the general issue with notice; and because a defendant may now plead as many matters as he may judge necessary for his defence, it by no means follows that he may also alter a prescribed form. The legislature having thought proper to appoint the mode by which a party shall avail himself of a set-off, and that mode affording a full and perfect remedy, it would be manifestly wrong to permit a departure from it.

But if the plea is good, the replication is so also; it tenders a full and perfect issue. What is the fact put in issue by the plea? Why, that the plaintiff purchased the goods of *Riley*, through *Brisban & Brannan*, his agents, and that the plaintiff had a set-off against *Riley*. Suppose the replication had also negatived the averment, that *Riley* was really and ultimately beneficially interested in this suit; and the cause had been brought to trial before a jury; and, on the trial, the plaintiff

had failed to prove that the goods were sold and delivered to him by *Brisban & Brannan*, as the agents of *Riley*; would it have been competent for him to prove that *Riley* was beneficially interested in any other manner? Clearly not. The interest of *Riley*, through *Brisban & Brannan*, is the fact put on trial by the plea; that fact is fully answered by the replication, and an issue tendered: the plaintiff's demurrer, therefore, was not well taken.

IN ERROR.

ALBANY,
March, 1815.CAINES
V.
BRISBAN.

The plaintiff's last plea is manifestly bad. I will add one reason to those contained in the decision of the Supreme Court. The act of 1811, which prohibits a preferential assignment by a debtor, has this exception in it: "But this proviso shall not extend to any debtor who shall have been imprisoned, impleaded, or prosecuted, as aforesaid, before the passing of this act; nor shall such debtor be required to take that part of the oath which relates to a preference among creditors."

The plaintiff's plea has no averment, that *Riley* was not imprisoned, impleaded, or prosecuted, before the passing of the act. If, then, an assignment, under this act, to a *bona fide* creditor, made by a debtor imprisoned, impleaded, or prosecuted, after the passing of the act, was void, yet, if such debtor had been imprisoned, impleaded, or prosecuted, before the act was passed, he had a right, by the very provision of the act, to make a preferential assignment to a *bona fide* creditor; such assignments were left on the same footing as though this act had never had existence. The plea admits that *Fairchild* was a *bona fide* creditor; and, for aught that appears upon the face of this plea, *Riley* had a just and legal right to make the assignment *to him. I am, therefore, of opinion, that the judgment of the Supreme Court ought to be affirmed.

[* 26]

SANFORD, senator. Without examining all the questions which learning and ingenuity have brought into discussion, in this cause, my mind rests with satisfaction upon two points which are decisive.

Whether the second plea is good or bad, I think the replication sufficient. The plea alleges, that *Riley* was the real vendor of the goods; this allegation is material, and is, indeed, the basis of the whole plea. The replication denies that *Riley* was the real vendor of the goods, and thus selects a single certain material fact, from the various matters set forth in the plea, and puts it in issue. The other facts are admitted, this alone being denied. The question, whether *Riley* was the real vendor, or not, appears to me to be a fair and material issue, and one which must determine the whole cause.

The third plea is bad in substance. Taking the facts as they are stated, *Fairchild*, a creditor, had a right to obtain payment from *Riley*, his debtor; and *Riley* had a right to pay this creditor, in preference to others. *Riley* assigned the debt demanded by the suit to *Fairchild*, who received it in part payment of

IN ERROR

ALBANY,
April, 1815.SOLOMONS
v.

M'KINSTRY.

March 23th.

Riley's debt to him. The intention of *Riley* to prefer *Fairchula* to other creditors, and to apply for his own discharge from his debts, cannot invalidate this assignment, or payment. Such a transaction is clearly valid at common law, and is not impeached by the statute of the 3d of *April*, 1811.

For these reasons, I am of opinion, that the determinations of the Supreme Court, upon both demurrers, were correct, and that their judgment ought to be affirmed.

This being the unanimous opinion of the Court, it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court be affirmed; and further, that the defendants in error recover against the plaintiff, their damages, by reason of the delay of the execution, and also their costs, in defending the writ of error, in this cause, to be taxed, &c.; and that the record be remitted, &c.

Judgment of affirmance.

[* 27]

*LEVY SOLOMONS, *plaintiff in error*,
against
JOHN M'KINSTRY, *defendant in error*.

An award of payment of a specific sum, by one party to the other, is final, and sufficient without a release.

Where an umpire awarded, that the defendant should pay to the plaintiff a certain sum, with interest until paid, 'as the plaintiff appeared to have a just claim on the defendant for that sum, or even more, if insisted on;' and, "that should any errors in addition or calculation of interest be found in the account, upon

A WRIT of error was brought to reverse the judgment of the Supreme Court in this cause. For the facts in the case, and the judgment of the Court below, see the S. C., reported in 2 *Johns. Rep.* p. 57—62.

THOMPSON, Ch. J., gave the reasons for the judgment of the Court below, which were the same as those stated in the report of the case in that Court.

The cause was argued by *Van Vechten*, for the plaintiff in error; and by *Woodworth*, for the defendant in error.

The counsel for the plaintiff in error cited *Kyd on Awards*, 206. 1 *Ld. Raym.* 246. 2 *Saund.* 62 a. 12 *Mod.* 129. 8 *Co.* 193. *Bascole's case*, 2 *Saund.* 61 n. 5. 1 *Caines*, 319. *Atk.* 644. 1 *Caines*, 363. *Kyd on Awards*, 252, 253. 1 *Roll. Ab.* 362. 2 *Co.* 192. *Cro. Jac.* 663.

The counsel for the defendants in error cited 1 *Burr. Rep.* 280. *Caines*, 319. 7 *Term Rep.* 73. 3 *Atk.* 644.

proof thereof being made by the defendant to the plaintiff, the plaintiff should immediately refund to the defendant the amount thereof," the award was held final and valid.

Where an umpire was chosen and appointed, *of and concerning the premises*, and it was stated that he took upon himself the burden of the umpirage, it is to be intended that he awarded concerning the subject matter submitted. (a)

(a) Vid. *Byers v. Van Deusen*, 5 *Wendell's Rep.* 268.

CANTINE, senator. On the argument, two objections were urged against the judgment of the Supreme Court.

1st. That the award was not confined to the subject matter of the submission.

2d. That it was not final. With the latter objection, a want of mutuality in the award was in some measure mixed; but as that was not much relied upon, and as the opinion of the Supreme Court places that question on a footing which cannot be controverted, I shall confine my examinations to the two questions stated.

The difficulty, in this case, does not arise from a difference of opinion respecting the principles on which awards are to be construed, but in the application of those principles; for, if the award is not confined to the subject matter of the submission, or is not final, it is void.

*Upon this subject much confusion has arisen from two sources: 1st. From a difference between the extreme nicety formerly observed in the construction of awards, and the gradual relaxation which has taken place down to the present time; and, 2dly. From the almost infinite variety of forms in which awards are made, arising necessarily from the circumstance that they are generally penned by persons not well versed in legal proceedings, and not unfrequently by those who are wholly unskilled in the construction of language; and these causes present a difficulty that, probably, can never be entirely removed. There ever will be some uncertainty in the application of the general rules which govern the construction of awards.

From a careful examination, however, of the questions which, in this case, are presented for our decision, there appears to be fewer and less difficulties than I apprehended when I first heard the argument; and I am entirely satisfied that the judgment of the Supreme Court is correct, and ought to be affirmed.

The submission, in this cause, was limited to the copartnership accounts of *Levy Solomons & Company*; but the umpire, in his award, does not aver that his umpirage was made "of and upon the matters submitted;" it is general, and awards "that *Solomons* shall pay *M'Kinstry* 423*l.* 19*s.* 4*d.*, as *M'Kinstry* appeared to have a just claim on *Solomons* for that sum, or more if insisted upon." It is contended that here arises an uncertainty, from the award not being limited to the submission, which renders it void. If the rule, requiring that an award shall not go beyond the submission, is to be so strictly construed as to make it necessary that it should be averred, in terms, to be so limited, then this award would be clearly bad, because it may, from the comprehensiveness of its terms, embrace differences not submitted; but the law does not require this extreme nicety. A more just and reasonable interpretation of the rule, one more consonant to common sense, and better calculated to promote the ends of justice, is, that where the words of an award are so comprehensive that they may take in matters not within the

IN ERROR.

ALBANY,
April, 1815.

SOLOMONS
V.
M'KINSTRY.

[* 28]

IN ERROR.

ALBANY,
April, 1815.SOLOMONS
v.
M'KINSTRY.

[* 29]

submission, yet it shall be presumed that nothing beyond it was awarded, unless the contrary be expressly shown; and the correctness of this construction is fully established by *Kyd*, in his *Treatise on Awards*, 170, and the authorities there cited; and, also, in the case of *Hopper v. Hasket* (1 *Keble*, 738.)

*In *Ratcliffe v. Bishop*, (1 *Keble*, 865.) it was expressly adjudged, that it was not necessary that an award should, in terms, purport to be "of and upon the premises;" that it was sufficient, if, by the submission, it was provided, that it should be made "of and upon the premises;" for that, in such case, it must be intended that the award is limited to the submission, unless the contrary appear on the face of it. The submission, in this case, provides, expressly, that the award shall be, "*in and concerning the said matters in difference*," &c., in substance, the same as "of and concerning the premises;" and no mischief can arise from the adoption of this rule, because the party objecting has a right to show, by pleading, that matters out of the submission are embraced in the award. In the case of *Ingram v. Webb*, (1 *Roll. Rep.* 362.) there was a submission of all suits and controversies between the parties, *respecting tithes* of "corn and hay in a certain parish;" the award was, that the defendant should pay the plaintiff 40*l.*, and that the plaintiff should permit all *suits* and controversies between them to cease. On a suit brought on the award, the plaintiff averred that there were not any other suits for tithes; the defendant rejoined, that there were other suits, but not concerning the tithes; the plaintiff had judgment, which was affirmed in the exchequer chamber, on the ground that the order, "that all suits should cease," should be confined to suits relating to tithes, as they only were within the submission.†

† 2 *Mod.* 309.
Kyd on Awards,
371.

The award is said not to be final, because the umpire alleged that more was due than the sum awarded, if insisted on, and that *M'Kinstry*, therefore, was not bound by it; and that this award would not have been a good bar against a suit he might have brought on the original demands. It does not appear to me that this conclusion follows, necessarily, or that it is even a fair and rational one.

The award was not drawn with technical nicety, but with sufficient accuracy to communicate, distinctly, the intention and meaning of the umpire; the obvious interpretation is, that from the evidence produced, he was satisfied that a greater sum was strictly due to *M'Kinstry* than what was awarded; but as *M'Kinstry* did not think proper to insist upon or claim the whole, he had, with his assent, given his award for a less sum. As the umpire had taken upon himself the umpirage, he was in duty bound to do exact justice between the parties; to award *less than he was conscientiously satisfied was due to *M'Kinstry*, without his assent, would have been palpably unjust; the fair, honest, and legal presumption is, that *M'Kinstry* consented to the reduction of the sum; he was, therefore, concluded by it

[* 30]

and it certainly cannot lie with *Solomons* to find fault. Another objection was urged against this award, on the ground that it was not final, which, on the argument, struck me as being serious; but, from subsequent reflection, I am convinced that it is as untenable as the others. The award provides, that should any errors in addition, or calculation of interest, be found in the account, upon proof of such errors being made by *Solomons* to *M'Kinstry*, the latter should immediately refund the amount thereof. It was said, that there were several modes of calculating interest, and that the adoption of the one or the other would produce a very different result as to the amount. It is true that there are different modes, which may sometimes occasion a material variance. But the fair and rational presumption is, that the umpire adopted the mode recognized in the Courts of justice in the country where the contract was made; and, at all events, as the parties had submitted their differences to arbitrament, they were concluded by the mode adopted by the umpire; by their submission, they constituted him as much their judge on that question as any other, and were as much bound by his decision as they would have been by the judgment of a Court of law; the mode of calculating of interest was not, therefore, among the objects of revision and correction provided for by the award; the errors to be revised were exclusively confined to mistakes which the umpire might have made in the multiplication or addition of figures. There was no part of the merits of the controversy left open, nor did the umpire delegate any portion of his power or authority to another. The sum due, the time for which it should bear interest, and the manner in which that interest was to be calculated, he had determined.

This case does not come within the reason of any of those where awards have been considered as void, in consequence of containing provisions for refunding a part of the sum awarded, under certain circumstances. These cases will all be found to apply only where the sum to be refunded is part of the principal, and depending upon evidence, and, therefore, entering into the merits of the controversy; and not as in the present case, which depends upon mere arithmetical calculation.

*Suppose this part of the award had been left out, would it have varied the rights or remedies of either of the parties? In that case, if any errors had been discovered in the calculation, or addition of interest, *Solomons* would have been entitled to redress in a Court of equity; but that Court could not have interfered to correct any errors in judgment which the umpire might have committed. Does the award, as it stands, provide any mode of relief to *Solomons*, for errors in calculation, or addition of interest, other than by having recourse to a Court of chancery? He could not have maintained an action at law on the award, until he had first proved that there were errors in the calculation or addition, of interest; that is the condition on

IN ERROR.

ALBANY,
April, 1815.SOLOMONS
V.
M'KINSTRY.

[* 31]

*IN ERROR.*ALBANY,
April, 1815.SOLOMONS
v.
M'KINSTRY.

Apr-21 3d.

which alone he is entitled to call on *M'Kinstry* to refund. Proof means legal proof; and how could he produce legal proof of the existence of such errors, without first having resort to a Court of equity? This part of the award is utterly useless, and might be stricken out without any prejudice whatever to either party; it is mere surplusage.

I am for affirming the judgment of the Supreme Court.

This being the opinion of the Court, (*Bishop*, senator, dissenting,) it was thereupon ORDERED and ADJUDGED, that the judgment of the Supreme Court be affirmed, and that the defendant in error receive his damages, by reason of the delay of execution, and their costs in this Court; and that the record be remitted, &c.

Judgment affirmed.

END OF THE CASES IN ERROR.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1816, IN THE FORTIETH YEAR OF OUR INDEPENDENCE.

SHORT against WILSON and others.

THIS was an action of trespass on the case, which was tried at the *Ontario* circuit, in *June*, 1814, before Mr. J. Van Ness, and a verdict taken for the plaintiff, subject to the opinion of the Court.

The declaration contained four counts, in the three first of which the plaintiff alleged an injury to his reversion in 100 acres of land, in lot No. 53, in township No. 11, in the town *of *Phelps*, by digging and carrying away *gypsum*: the fourth was a count in *trover*. The defendant pleaded the general issue, and several special pleas denying the title, and alleging a title out of the plaintiff.

The original title to the land was in *Oliver Phelps*, under whom both parties claimed; and the plaintiff produced a deed from *Phelps*, for the premises mentioned in the declaration,

discharged from making a conveyance,) in trust, to convey the premises to *M.* or his appointee, when he should have made the payments and performed the covenants stipulated in his contract.

A., by *B.*, his attorney, covenanted, the 22d of *September*, 1799, to convey part of the lot to *S.*, who paid part of the purchase to *B.*, and the residue to *A.*, who conveyed the premises to *S.*, by deed, dated 14th of *November*, 1801.

M. having failed to perform his contract, *B.*, by a deed, (dated the 29th of *September*, 1813, and executed by virtue of a power from *A.*, dated the 16th of *December*, 1799,) reciting that *A.* had assigned the contract of *M.* to *C.*, in trust, for the executors of *G.*, conveyed the premises in question to *C.* It was held, that *S.* had a good title, under his deed, notwithstanding the previous contract with *M.*, and the deed to *B.*; as *M.* having failed to perform his contract, the trust in *B.* was at an end, and resulted to *A.*, and *B.* had no authority to execute a deed, afterwards, without a new power.

That *A.* and *B.* having, subsequently to the deed of trust, made the agreement with *S.*, which had been carried into effect, it was a revocation of the trust, as it regarded *S.*, and that the subsequent deed to *C.* was inoperative on the ground of the adverse possession of *S.*

An action on the case, in the nature of waste, lies against the assignee of a lessee.

A., by his deed, dated *January* 16th, 1799, conveyed a lot of land to *B.*, (reciting a contract of purchase between *A.* and *M.*, dated *August* 23d, 1797, by which *M.* covenanted to pay one fourth of the purchase money on the 23d of *August*, 1799, &c., and agreed that, if he failed in performance, *A.* was to be

[* 34]

ALBANY,
January, 1816.

SHORT
V.
WILSON.

[* 37]

made by the plaintiff with *Peter B. Porter*, as attorney for *Oliver Phelps*. The articles of agreement bear date the 22d of *September*, 1799. The power of attorney to *Porter* was not produced, but the case furnishes abundant evidence that *Phelps* ratified the act, and adopted it as his own; for he received part of the consideration money, and executed a deed pursuant to the contract. There would, therefore, be no doubt of the plaintiff's title to the lot, if it were not for the previous contract, made with *Adam Miller*, bearing date the 23d of *August*, 1797, and the deed, in trust, given by *Phelps* to *Peter B.* and *Augustus Porter*, bearing date the 16th of *January*, 1799. A little examination, however, will show, that neither of these instruments will form any objection to the plaintiff's title to the land. By the contract with *Miller*, the deed was to be given in 1802; the consideration money to be paid by instalments, all payable before the deed was to be given; and the contract expressly provides, that if *Miller* should fail in the performance of any of the covenants on his part, then *Oliver Phelps* was to be fully discharged and acquitted from making the conveyance. By these articles, the first payment fell due the 23d of *August*, 1799; *Miller* failed in performing his contract; this appears from numerous *parts of the case, and is expressly so recited in the deed from *P. B.* and *A. Porter* to *Brooks*, under which the defendants claim. *Miller* having failed in the performance of his contract, *Phelps* had, undoubtedly, a right to avail himself of the forfeiture, according to the provisions in the articles of agreement. There can be no stronger evidence of his intending so to do, than the sale made of the same land a short time thereafter, (22d of *September*, 1799,) to the plaintiff in this cause.

The deed, in trust, given by *Phelps* to *P. B.* and *A. Porter*, would form no impediment to the contract made with the plaintiff, for it was made through the agency, and with the assent, of all parties to the deed in trust, both principal and attorneys, the *cestuy que trust* and trustees. *Peter B. Porter* made and signed the contract, *Augustus* received part of the consideration money, and *Phelps* the residue; and he also consummated the title, by giving the deed pursuant to the contract. Here, then, was a revocation of the trust, so far as it related to this land, with the assent and concurrence of the trustees, and *cestuy que trust*. Besides, the trustees had not, under their deed, any authority to execute the trust. This deed refers, generally, to the contracts that had been made by *Phelps*; and the trustees were only directed to give deeds to such purchasers as should fulfil the conditions and payments, in their respective articles of agreement stipulated, according to the tenor and effect of such articles. *Miller* did not fulfil his contract, and the trust, so far as it respected him, was at an end, and resulted to *Phelps*; (1 *Cruise's Dig.* 475. 2 *Fonb. B.* 2. ch 5. s. 1.) and the trustees had no authority to give a deed

without some new power or direction from the *cestuy que trust*. Such, also, must have been the understanding of all parties at that time; for no deed was executed under these articles until September, 1813, when it was given to *Peter C. Brooks*. Nor can the power of attorney, given by *Phelps* to *P. B.* and *A. Porter*, on the 16th of December, 1799, in any manner impeach the plaintiff's title; that was a power to transfer certain lands, and articles of agreement, to secure to *Rebecca Gorham*, and others, the sum of 12,500 dollars, and the bond and articles of agreement with *Miller* were assigned to *Brooks*, in trust, to be paid to the heirs or administrators of *Nathaniel Gorham*, when collected. This power is dated after the contract made with the plaintiff for the land in question, and could not prejudice his rights. *Miller's* bond and articles were assigned, among considerable other property, in trust, for *the heirs or administrators of *Gorham*; and nothing appears to have been done under the assignment for seven or eight years afterwards, when *Miller* was prosecuted upon the bond, and, being unable to pay, abandoned his whole contract, which was for much more land than what is now in question; the assignment, therefore, to *Brooks*, was not absolutely inconsistent with the sale of the one hundred acres to the plaintiff. It may be operative and effectual as to the residue of the land included in *Miller's* contract. The defendants must fail on the issue, which alleges the title to be in *Brooks*, for when the deed was given to him, there was clearly an adverse possession in *Spon*, who held under the plaintiff. I am, therefore, satisfied that the legal title to the land in question is in the plaintiff, and his claim to recover is fortified and strengthened by the equity of the case being, also, with him.

If the plaintiff has made out a legal title in himself, there can be no objection to his maintaining this action. *Spon* was in possession as his tenant, under a lease; and the defendants, previous to the time when the waste is alleged to have been committed, took from *Spon* an assignment of his lease; neither this lease, nor the assignment, is particularly set out in the case, but no objection appears to have been made, upon the trial, to the competency or sufficiency of the proof of them. We must, therefore, consider the defendants as the assignees of the plaintiff's tenant, and, of course, liable to this action, (2 *Saund.* 252. note.) We are, accordingly, of opinion, that the plaintiff is entitled to judgment.

ALBANY,
January, 1813.

SHORT
V.
WILSON.

[* 38]

ALBANY,
January, 1816.

AFRICAN SOC.
v.
VARICK.

THE NEW-YORK AFRICAN SOCIETY FOR MUTUAL RELIEF
against JAMES VARICK and others.

In debt on a bond to the committee, or trustees, of a corporation, *solvendum* to the corporation by its true name, the corporation may declare in [* 39]

their own name, and may allege, that the bond was made to them by the description of the committee, &c.

THIS was an action of debt on bond, and came before the Court on a general demurrer to the second count in the plaintiffs' declaration.

This count stated, that the defendants, by their certain writing obligatory, acknowledged themselves to be held and firmly bound unto the plaintiffs, by the description of the standing committee of the *New-York African Society for Mutual Relief*, in *the sum of, &c., to be paid to the plaintiffs when the defendants should be thereunto afterwards requested, with condition, that if *Daniel Barry*, one of the defendants, should well and truly observe and perform the duties enjoined upon him as treasurer of the *New-York African Society for Mutual Relief*, he having been appointed treasurer for one year, then the said obligation was to be void: the breach averred was, that *Barry* embezzled 800 dollars which he had received as treasurer, and absconded with it.

Riker, in support of the demurrer, cited *Gould v. Barnes*, 3 Taunt. Rep. 503. *Taft v. Brewster*, 9 Johns. Rep. 334.

Anthron, contra. He cited *Kyd on Corp.* 287. 6 Co. 65. a. 10 Co. 125. b. 3 *Wills.* 184. *Wiles's Rep.* 557.

Per Curiam. This case comes before the Court on a demurrer to the second count in the declaration. The action is debt, upon a bond given by the defendants to the plaintiffs, for the faithful discharge of the duties of treasurer of the society, by *Daniel Barry*. The declaration sets out the condition of the bond, with an averment of a breach. The second count states, that the defendants acknowledged themselves to be held and firmly bound unto the plaintiff, by the description of the standing committee of the *New-York African Society for Mutual Relief*, &c., to be paid to the plaintiff, &c. The ground upon which this demurrer was placed by the defendants' counsel was, that the suit should have been in the name of the trustees, or committee, and not in the name of the corporation. From the demurrer books, it does not appear that any trustees are named. There is no *oyer* of the bond; and the most that can be collected from the pleadings, is a misnomer of the corporation. By the declaration, however, it appears that the *solvendum* is to the plaintiff by the true corporate name, and this is sufficient. (3 *Wils.* 184.) Where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration, that the defendant made the deed to them, by the name mentioned in the deed. The

allegation in the declaration, that the defendants acknowledged themselves to be bound *unto the plaintiffs, by the description, &c.*, is equivalent to such an averment. (10 Co. 125. b. 1 *Kyd *on Corp.* 287.) The demurrer is, therefore, not well taken, and the plaintiff is entitled to judgment.

ALBANY
January, 1816.

DUNHAM
v.
DEY.

[* 40]

Judgment for plaintiffs.

DUNHAM *against* DEY.

THIS was an action of *assumpsit*, brought by the plaintiff against the defendant, as endorser of a promissory note, dated the 8th of May, 1812, drawn by *Matthias & William Ward*, for 750 dollars, payable to the defendant, ten days after date. The cause was tried at the *New-York* sittings, in April, 1814, before Mr. J. Yates.

The note in question was one of several notes executed by *M. & W. Ward*, dated the 8th of May, 1812, and payable to different persons, at different periods; in the whole amounting to 9,000 dollars. These notes were delivered by *M. & W. Ward* to the plaintiff, in exchange for his notes, payable at different periods, and amounting to the same sum of 9,000 dollars. This exchange was made on the 8th of May, 1812; and *M. & W. Ward* paid the plaintiff, as a commission for making the exchange, two and a half per cent., amounting to 225 dollars, which was paid, at the time, in money. It appeared that *M. & W. Ward*, when this transaction took place, were indebted to the plaintiff, for borrowed money, in the sum of 4,000 dollars. On the 7th of May, the plaintiff wrote a letter to one of them, couched in the following terms: "If the sum borrowed is not returned, or some person's check left, payable to-morrow, in whose signature reliance can be placed, and that attended to before half past 4 o'clock, *this day*, I shall take such steps for the recovery of it, which may be considered of an unpleasant nature." The plaintiff, at this time, had a judgment which had been entered up against *Matthias Ward*, on a bond conditioned for the payment of 20,000 dollars.

On the same, or the next day, *M. Ward* applied to the plaintiff for an advance in notes of the plaintiff. The plaintiff asked what security he would give; *Ward* then exhibited a list of *names of persons whom he would get to endorse his notes, and gave as a reason for wishing the plaintiff's note, that he could negotiate it better than his own; and it was understood

Where *A.* receives *B.*'s note, on giving *B.* his note at 10 days, for the purpose of raising money on *B.*'s note, and pays *B.* two and a half per cent. commission, this is a loan within the statute of usury, and *A.*'s note is usurious and void. (a)

Evidence that it was the usage of trade to take two and a half per cent. commission on the exchange of paper, is inadmissible; for usage is of no avail, if the transaction comes within the meaning of the statute. (b)

It seems that a person may lawfully receive a commission for becoming security for another.

It seems that the practice of the banks of issuing post notes is not, in itself, usurious.

[* 41]

(a) Vide *Rice v. Mather*, 3 *Wendell's Rep.* 62. *Powell v. Waters*, 8 *Cow. Rep.* 669. *Dunham v. Gould*, in error, 16 *Johns. R.* 367. *N. Y. Firemen's Ins. Co. v. Ely*, 2 *Coven*, 678. *Bank of Utica v. Wager*, *Id.* 712.

(b) *Dunham v. Gould*, in error, 16 *Johns. R.* 367.

ALBANY,
January, 1816.

DUNHAM
v.
DEY.

that *Ward* was to negotiate the plaintiff's notes to raise money out of which the debt of the plaintiff was to be paid; and it was accordingly paid on the 8th of *May*. (a) It was testified, that the application for the loan of the notes was separate and distinct from any other transaction.

Evidence was given as to the usage and custom of merchants; and several witnesses were examined, some of whom stated it to be usual and customary to charge and receive two and a half per cent., on the exchange of paper, on advancing a responsibility; but others knew nothing of any such custom.

The judge charged the jury, that if they believed the transaction between the plaintiff and *Ward*, to have been for the purpose of raising money at a greater rate of interest than seven per cent. per annum, which they were warranted to infer, from the evidence before them, then such intention made it intrinsically a loan, and the transaction was usurious and void; that the evidence of usage was not sufficient, and, if proved, that it could not prevail against the existing law.

The jury found a verdict for the defendant.

A motion was made, on the part of the plaintiff, to set aside the verdict, and for a new trial.

[* 42]

**Hoffman*, for the plaintiff. This is clearly not a usurious loan, within the words of the statute; nor does the transaction show a shift or contrivance to get rid of the statute. It is no more than the charge of a regular mercantile commission of 2½ per cent. The banks often issue *post notes*, payable at distant periods, for which they receive the amount in cash; yet no person has considered such a transaction as usurious, within the meaning of the statute. A commission is often paid for becoming surety at the custom-house, or for endorsing bills of ex-

(a) The notes given by *M. & W. Ward*, were as follows:

One note payable at 10 days after date, (the note in question,) for	750	dollars.
20	750	"
30	750	"
40	750	"
50	750	"
60	750	"
70	750	"
80	750	"
90	750	"
100	750	"
110	750	"
120	750	"
	9,000	

For which *Dunham* gave, in exchange, his notes,

One note at 2 months for.....	2,250	"
3	2,250	"
4	2,250	"
5	2,250	"
	9,000	

change. There was, also, sufficient evidence of a usage of trade, to repel the charge of usury. All these considerations would have had weight with the jury, if they had been permitted to deliberate upon them; but the judge was positive in his charge to them, that the transaction was usurious, that the evidence of usage was not sufficient, and, if clearly proved, would be of no avail.

ALBANY,
January, 1816
DUNHAM
v.
DEY.

Wells, and *D. B. Ogden*, contra. The words of the statute are broad enough to reach this case; but it is sufficient if it comes within the intent and scope of the statute. This is a palpable contrivance to raise money at more than the legal rate of interest. The case of a surety or guarantee is not analogous. That is not a loan. A commission for endorsing bills of exchange, which pass into foreign countries, may be allowable, as it is merely to give credit to the bill. So *post notes* circulate abroad, and do not return within the times at which they are made payable. But if these are usurious practices, they cannot justify similar practices. To allow them, would virtually be a repeal of the statute.

In *Parr v. Eliason*,† an agreement, on discounting a bill, to take another bill, which had time to run, as cash, was held usurious. In *Kent v. Lowen*,‡ the very point was decided by Lord *Ellenborough*, that a commission of $2\frac{1}{4}$ per cent., for accommodating another with an acceptance, was usurious. The same point was, afterwards, decided by *Le Blanc, J.*, in *Ackland v. Pearce* § “In all questions of this kind,” Lord *Mansfield* observed, in *Floyer v. Edwards*,|| “we must get at the nature and substance of the transaction;” and that where there is a loan of money for more than legal interest, “the wit of man cannot find a shift to take it out of the statute.” Usage cannot be set up to avoid the provision of a statute; the evidence of usage, therefore, *cannot avail. It becomes the duty of the Court to frown upon such usurious practices.

† 1 East, 92.

‡ 1 Camp. N.
P. Rep. 171

§ 2 Camp. N.
P. Rep. 599.
|| Coop. 112

[* 43]

T. A. Emmet, in reply. The usage is universal, and co-extensive with commerce, to allow a commission, on a lending of a credit, guaranty, or responsibility. True, such a usage may be made, sometimes, to cover a usurious transaction; but the only question is, Has there been an attempt to evade the statute? The most enlightened writers on political economy have questioned the utility of statutes against usury; believing it would have been better to have left each individual case to a Court of equity to decide on the good conscience of the particular transaction. The legitimate object of the statute, no doubt, is to protect the ignorant, inexperienced, and needy, against the oppression of the rich, and the arts of avarice. It ought not to be extended to commercial dealings between merchants, who understand each other, who calculate all the advantages which are to result from their various operations, and who know

ALBANY,
January, 1816.

DUNHAM
v.
DET.

their own interests too well to require any legislative aid or protection.

This is a question as to a mere mercantile transaction, in the exchange of paper. The plaintiff had no concern with the purpose for which *Ward* wanted the notes, nor with the manner he intended to use them. It is a very interesting and important question to the commercial world, whether such an exchange of paper is, in every case, to be considered as a cover for a usurious loan. To make it usury there must be a *loan*, and a sum taken for a forbearance of payment. This is not a *loan*; it is a mere barter or exchange of notes; and there may be a great difference in the value of the things exchanged. In barter, a party may lawfully take *boot*. The note or thing is not to be returned; it is sold or exchanged; and it is like the exchange of a chattel. In a *bona fide* commercial transaction, a merchant may receive a commission for lending his name or credit, and taking the risk of payment; what is done with the note, afterwards, cannot affect him. In *Floyer v. Edwards*, the distinction was taken between a *bona fide* commercial transaction, and a mere cover for usury; the former will be supported, though it exceeds the established rate of interest.

[* 44]

† 1 Bos. and
Pall. 144. Ord.
on Usury, (3d
ed.) 58, 59.

These *extra* allowances, in trade, not being for the forbearance of a loan, are not within the words of the statute; and the *usage of trade is not so much to show that they are warranted, as to repel the presumption that might, otherwise, arise, that they were, in truth, paid as usury, though under the name of commissions, with a view to evade the statute.†

SPENCER, J., delivered the opinion of the Court.

If the case was correctly submitted to the jury, there is an end of the question; for, certainly, they have considered the transaction as usurious. The plaintiff's counsel complain, that the judge, at first, permitted them to go into evidence of usage, and then withdrew it from the consideration of the jury; and they now insist that proof of usage was admissible, to show that the transaction was not intended as a cover for usury, and that, the proof having been given, the jury ought to have been permitted to take it into consideration, in deliberating on their verdict. They further insist, that the transaction, *per se*, is not either within the letter or the mischiefs of the statute.

In *Floyer v. Edwards*, (*Cowp.* 112.) Lord Mansfield permitted an inquiry as to the usage of the trade; but he said the practice and usage would avail nothing, if meant as an evasion of the statute, for that usage certainly would not protect usury, but that it went a great way to explain a transaction, and was, in that case, strong evidence to show that there was no intention to cover a loan of money. These observations were applied to the case of a sale, and, under the circumstances of that case, it might have been proper, and probably was so, to inquire into the usage of that particular branch of business; but it cannot

ALBANY,
January, 1816DUNHAM
v.
DEY.

be admitted, as a general rule, that usage may, in all cases, be given in evidence, or that the usage, if proved, shall determine whether the transaction is usurious or not. Every case must, in a great degree, depend on its own circumstances; and Lord *Mansfield* lays down the rule, in the case already cited, with much perspicuity and force: he says, "it depends, principally, on the contract being a *loan*; and the statute uses the words 'directly or indirectly;' therefore, in all questions, in whatever respect, repugnant to the statute, we must get at the nature and substance of the transaction; the view of the parties must be ascertained, to satisfy the Court that there is a loan and borrowing, and that the substance was to borrow, on the one part, and to lend, on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the *statute. *If the substance is a loan of moneys, nothing will protect the taking more than five per cent.*; and though the statute mentions only, 'for loan of moneys, wares, merchandises, or other commodities,' yet *any other contrivance, if the substance of it be a loan, will come under the word 'indirectly.'*" It is impossible to conceive a more just, sound, and lucid exposition of the statute of usury, than the one given by this really great man.

[* 4.]

If, then, the evidence before the jury, independent of the usage, exhibited a transaction, *the substance of which was to borrow on the one part, and to lend on the other*, at a greater rate of interest than 7 per cent. per annum, and if this entered into the concoction of the bargain, then, undoubtedly, the transaction was usurious, and the notes were contaminated by it, and void. In this point of view, the usage was properly laid out of the case, because it does not go to show, that the negotiation between the plaintiff and *W. & M. Ward* was not a loan on the one side, and a borrowing on the other; but its tendency was to prove, admitting it to be so, that there was a usage to lend and borrow at a higher rate of interest than that allowed by the statute.

I perfectly concur in the opinion expressed by the judge, at the trial, that the evidence in this case warranted the jury in inferring, that the transaction between the plaintiff and *M. & W. Ward* was for the purpose of raising money at a greater rate of interest than 7 per cent., and that that made it, intrinsically, a loan, and, therefore, the transaction was usurious and void.

The testimony clearly shows, that the object of *M. & W. Ward*, in the exchange of the notes, was to obtain the plaintiff's notes, for the purpose of raising money on them, and that his notes were considered better adapted to that object than the notes which *M. & W. Ward* gave in exchange; and although the witness declares, that the exchange of the notes was separate and distinct from the money *M. & W. Ward* owed the plaintiff, yet we find that the plaintiff's notes were immediately used by *M & W. Ward*, to raise money on, and that the plain-

ALBANY,
January, 1816.

DUNHAM
v.
DEY.

[* 46]

tiff was immediately paid the 4.000 dollars due to him. This debt, undoubtedly, was distinct from the exchange of the notes, but we have a right to infer, and cannot but believe, that *M. & W. Ward* entered into the arrangement under the pressure of that debt, and that it was in the contemplation of the parties, that *the plaintiff should be forthwith paid, out of the moneys to be raised on his own notes, by *M. & W. Ward*.

The judge, to be sure, gave his opinion to the jury on the evidence; this, however, does not derogate from the full weight and effect of the finding; the jury had a right to draw their own conclusions from the evidence before them, and it is as fully their verdict, as if no opinion had been expressed by the judge. In a doubtful case, or where the weight of evidence is against the verdict, I do not mean to be understood that, on a motion for a new trial, some stress might not be laid on the circumstance that the judge gave his opinion on the evidence; but, in this case, I clearly think no argument, favorable to the plaintiff, can be drawn from that consideration.

Why was not this a lending on the one part, and a borrowing on the other, indirectly? We have the high authority of Lord *Mansfield*, that any contrivance, if the substance of it be a loan, will come under the word "*indirectly*." What is the difference between a man's lending his notes to raise money upon, taking more than legal interest, and lending his money? I confess I perceive no other difference than this, that the borrower of the notes must, probably, pay more usury to get them converted into cash; but the transaction is, substantially, a lending of money; and I agree with the defendant's counsel, that, if this device be tolerated, the statute is judicially repealed.

This very case has occurred in *England*, and been decided by Lord *Ellenborough* and Justice *Le Blanc*, (in 1 *Camp*. 177. and 2 *Camp*. 599.) In the first case, which was a suit against the maker of a note, for 153l. 15s., payable, in ninety days, to Messrs. *Coates & Co.*, and endorsed to the plaintiffs, the defence was, that the note had been given upon a usurious agreement between the maker and payees; and it was proved, that *Coates & Co.* agreed to accommodate the maker with their acceptance at three months, upon receiving his note for the same sum at ninety days, together with two and a half per cent. commission. Lord *Ellenborough* held, that there was no color for a commission, and that the two and a half per cent. must be considered as usurious interest, and the commission a mere cloak for usury. The defendant had a verdict, and we do not find that the decision was ever questioned. In the other case, Judge *Le Blanc* adopted the same principle, and although the case was reviewed, his decision, on that point, was not objected to.

[* 47]

*Here I might conclude, but it is fit that notice should be taken of some arguments used by the plaintiff's counsel, drawn from what they consider analogous cases. It is said, that it is the usage for endorsers of bills of exchange, and sureties on

custom-house bonds, to take a per centage for advancing their responsibilities. I see nothing improper in this; there is no loan of money, directly or indirectly, in either of these cases; they come neither within the terms or mischiefs of the statute, and they are innocent transactions. The practice of issuing post notes by the banks, is supposed to justify the taking commissions on advancing notes, under the circumstances attending this transaction. That practice is extremely well considered in *Hammett v. Yea*, (1 *Bos. & Pull.* 144.) and Ch. J. *Eyre* draws the distinction, with great accuracy, between what will, and what will not, render such a transaction usurious. A person applies to a banker to have a note discounted; the banker agrees to discount, and is ready to pay the money immediately, after deducting the interest for the time the note has to run; the applicant then asks for a post note, payable at a future day, for his own accommodation, and this is given him. Ch. J. *Eyre* held this not to be usurious, and he considered it as two contracts, the one for a loan, and the other independent of the loan, and for a remittance; but he held that, had the banker imposed this remittance on the borrower, as a term of the discount, it would have been usury: and in this opinion the other judges concurred. This case shows, I apprehend, the practice of the banks to be correct; and it fully shows that this transaction, in this case, is usurious, because, here, the two and a half per cent. was imposed as a term on *M. & W. Ward*, and was part and parcel of the contract.

The plaintiff, independent of the two and a half per cent., was to derive considerable advantage from the transaction; the notes he took from *M. & W. Ward* fell due some time before those he gave in exchange; but it is not necessary to inquire, whether that is also usury, the other point being decisive.

Motion denied.

ALBANY,
January, 1816.

NIVEN
v.
MUNN

*NIVEN *against* MUNN.

[* 48]

THIS was a motion in arrest of judgment in an action of slander, in which a verdict was given for the plaintiff.

The declaration contained two counts; the first count stated that the defendant, in a certain discourse which he had of and concerning the trial of a certain cause between *David Munn* and *John Wilson*, then lately had, before *Samuel Barnard, Esq.*, a justice of the peace, in and for the county of *Sullivan*, and of and concerning the testimony of the plaintiff, who was sworn

A declaration in slander, for charging the plaintiff with swearing to a lie, as a witness on a trial, in a justice's Court, in which it is not stated that the justice had jurisdiction, or that the tes-

timony was given upon a material point, is good; at least, after verdict.

The same certainty is not requisite as in an indictment for perjury. (a)

(a) Vid. *Gibbs v. Dewey*, 5 *Cow. Rep.* 503. *Fox v. Vanderbeck*, *Ibid.* 513 *Chapman v. Smith*, *infra*, 78 See, also, *Bullock v. Coon*, 9 *Cowen*, 30.

ALBANY,
January, 1816.

NIVEN
v.
MUNN.

as a witness, by the said *Samuel Barnard*, (he being a justice as aforesaid, and having full power and lawful authority to administer an oath,) on the trial of the cause, and testified as a witness therein, spoke and published, concerning the plaintiff, these false, scandalous, malicious, and defamatory words, "*What he* (meaning the plaintiff) *has sworn to is a damned lie*," (meaning thereby, that the plaintiff had perjured himself on the trial of the said cause.)

The *colloquium*, words charged, and *innuendoes*, in the second count, were the same as in the first.

Brackett, for the plaintiff, objected, preliminarily, that the whole record ought to be produced, and not the declaration merely, in which the defect is alleged.†

† 1 *Salk*. 77.
Tidd's Pr. 825.

THOMPSON, Ch. J. It has not been the practice, in this Court, to produce the whole record, but the declaration only, adding that a verdict has been found for the party.

Betts, for the defendant. He cited 1 *Caines's Rep.* 349. 8 *Johns. Rep.* 109. *Hawk. P. C. B.* 2 ch. 25. s. 57. 1 *Hawk. P. C.* ch. 69. s. 4. 1 *Term Rep.* 69. 6 *Johns. Rep.* 82. 2 *Chitt. Pl.* 258. 4 *Bl. Com.* 137, 138.

Brackett, contra.

PLATT, J., delivered the opinion of the Court.

[* 49]

*This is a motion in arrest of judgment, after verdict for the plaintiff, in an action of slander.

I think *both counts* in the declaration are good.

To say of another, that "he has sworn falsely," or that "he has sworn to a lie," is not actionable, without a colloquium of its being in a cause pending. (*Hopkins v. Bedle*, 1 *Caines*, 347. *Stafford v. Green*, 1 *Johns. Rep.* 505.)

Here is a colloquium. The words, "*What he has sworn to is a damned lie*," are averred to have been maliciously spoken in a discourse "of and concerning the trial of a certain cause between *David Munn* and *John Wilson*, then lately had before *Samuel Barnard*, Esq., one of the justices of the peace, in and for the county of *Sullivan*; and of and concerning the testimony of the said *Niven*, who was sworn as a witness on the trial of the same cause, by *Samuel Barnard*, (he being a justice as aforesaid, and having full power and lawful authority to administer an oath,) and testified as a witness on the trial." All that is wanting to render this a complete and formal definition of *perjury*, is, 1st. That it is not expressly averred that the testimony of *Niven* was in a cause in which the justice *had jurisdiction*; and, 2dly. It is not expressly stated that the testimony spoken of was upon a *point material* in the cause.

But it was well said, in the cause of *Miller v. Miller*, (8 *Johns. Rep.* 74.) that "it is not necessary, in order to render words actionable, that there should be the same certainty in stating the crime imputed, as in an indictment for the crime."

The present case, I think, exemplifies the truth of that proposition. The discourse to which the words related, was sufficiently explanatory to effect the purposes of slander, and such as could leave no reasonable doubt that it was intended, by the defendant, to accuse the plaintiff of *perjury*. Besides, the averments are to be construed less strictly *after verdict*.

AL BANY,
January, 1816

BENNET
v.
JENKINS.

The plaintiff is entitled to judgment.

*BENNET *against* JENKINS and others, executors of
JENKINS.

[* 50]

THIS was an action of covenant, on the covenants contained in a deed of bargain and sale, and was tried at the *Columbia* circuit, in 1814, before Mr. J. *Van Ness*.

The deed, on the covenants in which the action was brought, was executed on the 1st of *March*, 1799, by the testator to the plaintiff, and contained the usual full covenants.

On the first of *March*, 1787, the testator conveyed the lot in question to one *Coffin*, who subsequently, and before the above-mentioned deed to the plaintiff, reconveyed it to the testator, having, however, in the mean time, mortgaged it to the loan officers of *Columbia* county. The plaintiff was evicted under a judgment and execution in ejectment, at the suit of *Jackson*, on the demise of *Powers*, who derived his title from the loan officers of *Columbia* county, of which suit the defendants had notice. The jury, under the direction of the judge, found a verdict for the plaintiff for the consideration money, six years' interest, and the costs of the ejectment suit. It was admitted that the plaintiff had erected a valuable brick house on the premises, and that the highest measure of damages would not compensate him for his loss: a case was made, stating the above facts, subject to the opinion of the Court, on the question as to the rule of damages.

In an action of covenant by a grantee, who has been evicted, on the covenants in his deed, the damages which he is entitled to recover, are the consideration money, with interest for such time as he is liable for the mesne profits, and the costs of the ejectment suit against him. (a)

E. Williams, for the plaintiff, contended that the plaintiff was entitled to the value of the premises, at the time of eviction, in the same manner as if it had been an action on the case against the testator, the grantor knowing, at the time of the conveyance, the defect in his title, in which case the Court, in *Fitcher v. Livingston*,† intimated, that in an action grounded on the

† 4 *Johns*
Rep. 1—12

(a) *Baldwin v. Munn*, 2 *Wendell's Rep.* 399. *Wager v. Sawyer*, 1 *Ibid.* 553.

ALBANY,
January, 1816.

BENNETT
v.
JENKINS.

fraud or deceit, the plaintiff would recover the full extent of his loss. He claimed, also, interest from the date of the deed.

Van Buren, contra. He cited 3 *Caines*, 111. and 9 *Johns. Rep.* 324.

[* 51]

Per Curiam. The question submitted to the consideration of the Court, in this case, is, to ascertain the rule or principle *upon which the damages are to be estimated. The action is covenant upon a deed, given by the testator to the plaintiff, dated the 1st of *March*, 1799, containing, as stated in the case, full covenants. The testimony shows a breach of the covenants of seisin, and for quiet enjoyment.

According to the principles heretofore established in this Court, it is clear that neither the increased value of the land, nor any improvements made thereon, are to be taken into consideration. (3 *Caines*, 111. 4 *Johns. Rep.* 1.) It is also settled by these cases, that the consideration money, and the costs of the ejectment against the grantee, are recoverable. The only point which seems to be in any measure undecided, is, as to the time for which interest upon the consideration is to be recovered, and even as to that, the rule is easily inferred from what is said by the Court in those cases. The allowance of interest is to countervail the claim for *mesne profits*, to which the grantee is liable. And, in the case of *Staats v. Executors of Ten Eyck*, it is said the interest ought to be commensurate, in point of time, with the *legal claim* to mesne profits. In the case of *Caulkin, executor, &c., v. Harris*, (9 *Johns. Rep.* 324.) six years' interest only was allowed, although the grantee had been in the enjoyment of the land, and taken the mesne profits for fifteen years. The reason why no more interest was allowed, doubtless, was because the grantee might protect himself against a recovery for mesne profits for any greater length of time. The time of the eviction, in the case now before us, or how long the plaintiff had been in the enjoyment of the land, does not explicitly appear. The judgment must, however, be for the consideration money paid, and the interest thereon, from the date of the deed from the loan officers to *Powers*, provided it does not exceed six years, together with the costs of the ejectment suit against the plaintiff.

Judgment for the plaintiff, accordingly.

OF THE STATE OF NEW-YORK.

*BRAMAN *against* HESS.

BRAMAN

V.
HESS.

THIS was an action of *assumpsit* by the endorsee against the endorser of a promissory note; the cause was tried at the Montgomery circuit, in 1815, before Mr. J. Yates.

The note was for 343 dollars and 25 cents, and was drawn by one *Edward Williams, jun.*, in favor of the defendant and *John Yerdan*, and by them endorsed to the plaintiff. The defendant offered to show, in mitigation of damages, that the transfer of the note, by the endorser to the endorsee, was made on a discount of 90 dollars; but the judge rejected the evidence, and a verdict was given for the plaintiff, for the full amount of the note, with interest.

The defendant moved for a new trial, and the case was submitted without argument.

Where, on the endorsement of a note, the consideration passing between the endorsee and his endorser is not equal to the amount of the note, the endorsee, in an action against the endorser, can only recover the consideration which he has actually paid. (a)

Per Curiam. The evidence offered on the part of the defendant ought to have been received, according to the principle which governed the case of *Wiffin v. Roberts*, (1 *Esp. Cas.* 261.) and which was adopted and sanctioned by this Court in *Brown v. Mott*, (7 *Johns. Rep.* 361.) This suit is by the endorsee against his immediate endorser. And in the case of *Livingston v. Hastie & Patrick*, (2 *Caines's Rep.* 248.) it is explicitly laid down, that the payee will be allowed, against the drawer, and the endorsee against his immediate endorser, to show what was the real consideration passing between them. If this suit was by the endorsee against the maker of the note, it would not lie in his mouth to say the plaintiff purchased it at a discount; but as the defendant was the immediate endorser of the plaintiff, the proof offered that the note was purchased for 90 dollars, under the face of it, should have been admitted. A new trial must, therefore, be granted, unless the plaintiff will remit the 90 dollars, and the interest which has been recovered thereon.

(a) Vid. *Wright v. Butler*, 6 *Wendell's Rep.* 284. *Munn v. Commission Co.* 15 *Johns. Rep.* 44. *Powell v. Waters*, 17 *Johns. Rep.* 176. *Baker v. Arnold*, 3 *Caines's Rep.* 279.

ALBANY,
January, 1816.

THORPE
v.
WHITE.

Where there is a contract of hiring for a definite period of time, at a certain rate per day, and a part only of the time having elapsed, the parties settle the amount of the wages which had then been earned, and the hirer gives his note to the servant for the amount; in an action on the note, it is no defence that the payee had left the maker's service before the expiration of the time for which he had been originally hired; although, had there been no subsequent modification of the agreement, he could not have recovered wages until he had served the whole period agreed upon. (a)

*THORPE against WHITE and others.

THIS was an action of *assumpsit*, which was tried at the Albany circuit, in October, 1815, before Mr. J. Yates.

The plaintiff produced, at the trial, a promissory note, executed by the defendants, which, being admitted, the counsel for the defendants offered to prove, under the notice subjoined to the plea, that the defendants being the owners of a cotton manufactory, the plaintiff, who was a joiner, about three months before the execution of the note, entered into their service, and it was agreed that the defendants should instruct the plaintiff in the making of the machinery necessary and proper for the said manufactory, and should pay the plaintiff at the rate of one dollar per day for one year, for his wages in making the same; in consideration whereof, the plaintiff agreed to work for the defendants for one year at that rate, and it was further agreed, that the defendants should settle with the plaintiff at the end of every three or four months; that at the expiration of about three months from the time the agreement was entered into, the parties computed the amount then due for the plaintiff's services, at the stipulated rate, and the note on which the action was brought was given for the amount; and, shortly afterwards, the plaintiff left the service of the defendants without their consent. The evidence, being objected to on the part of the plaintiff, was rejected by the judge, and a verdict was given for the plaintiff.

The defendants moved for a new trial, and the case was submitted to the Court without argument.

Per Curiam. According to the principles adopted by this Court, in the case of *M. Millan v. Vanderlip*, (12 Johns. Rep. 165.) the original contract between the parties was an entire contract; and if there had been no subsequent modification, the plaintiff could not have recovered upon it until the expiration of the year. But the giving of the note in question, by the defendants, was, *pro tanto*, a change or modification of the original agreement, and precludes them from setting up the original agreement against their own note. The evidence offered was, therefore, properly overruled, and the motion for a new trial must be denied.

Motion denied.

(a) *Rapelyr v. Mackie*, 6 Cow. Rep. 250. *Hoar v. Clute*, 15 Johns. Rep. 224. *Jennings v. Camp*, infra, 94.

ALBANY,
January, 1816.WINTER
v.

LIVINGSTON.

A. executes certain promissory notes to B., and procures land, of which he is the *cestuy que trust*, to be conveyed to B., under an agreement that B., on the payment of the notes, should reconvey the land; the notes not being paid, and B. having exercised acts of ownership on the land, by selling, &c., he cannot support an action on the notes, there being a failure of consideration; and the agreement being void on the non-payment of the notes, if B. elected so to consider it; and, by exercising acts of ownership, he had determined his election, and had a complete title to the land

WINTER *against* LIVINGSTON.

THIS was an action of *assumpsit* on three promissory notes, made by the defendant in favor of the plaintiff, dated *June* 1st, 1803, one payable 11 months after date for 10,000 dollars, one payable 23 months after date for 5,000 dollars, and the other 35 months after date for 7,549 dollars and 7 cents. The cause was tried at the *New-York* sittings, in *April*, 1815, before Mr. *J. Van Ness*.

The due execution of the notes having been admitted, the defendant produced, in evidence, a certain instrument executed by the plaintiff, which was as follows:—

“Know all men by these presents, that I, *Joseph Winter*, of the city of *New-York*, Esq., for myself, &c., do covenant and agree to, and with *Edward Livingston*, of the same place, esquire, that provided he, the said *Edward Livingston*, shall well and truly pay to me, &c. the full amount of three several promissory notes, (describing them, being the notes above mentioned,) that then, and in such case, and not otherwise, I will convey to the said *Edward Livingston*, and his heirs, in fee simple, a tract of land this day conveyed to me by *Thomas Maule*, of the city of *New-York*, being the residue of a tract of land granted to him by patent, dated, &c., after deducting 20,078 acres, conveyed, &c., which residue is said to contain 25,000 acres; but it is hereby expressly declared to be the intent of the parties hereto, that if the said several notes, or either of them, shall not be paid at the several times when they, or either of them, ought to be paid, that then this covenant shall be void and of no effect. And it is also agreed, that all such sums of money as shall be received for sales of the said lands by settlers, by an agent to be appointed, jointly, by *Joseph Winter*, *Edward Livingston*, and *Thomas Maule*, (to whom the land is mortgaged by *J. Winter*,) *shall be credited on *Winter's* bonds and mortgage to *Maule*, and on *Edward Livingston's* notes above recited. The lands, on the payment of the notes, to be conveyed free from encumbrance created by *Joseph Winter*, or any one claiming under him. In witness,” &c. Signed *J. Winter*, and dated the 11th of *July*, 1803.

It appeared that *Livingston*, the defendant, being indebted to *Maule* in a large sum of money, and *Maule* holding, for the defendant's use, a tract of land on lake *Champlain*, (to which land the defendant was entitled, but the patent had been taken out in *Maule's* name,) it was agreed between the defendant and plaintiff, that the plaintiff should become responsible to *Maule* for the defendant's debt, on his receiving a conveyance from *Maule* of the said tract, but that the defendant should have a reconveyance, on his paying to the plaintiff the sum of 3,125 dollars over and above the sum due to *Maule*. The agreement,

[* 55]

ALBANY,
January, 1816.
~~~~~  
WINTER  
v.  
LIVINGSTON.

being the one above stated, was reduced to writing, and *Winter* gave his obligations to *Maule* for the sum so due, with interest, payable in six, twelve, twenty-four, and thirty-six months, and the defendant executed, and delivered to the plaintiff, the notes on which the action was brought, which fell due, except the first, each one month prior to the time fixed for the payment of the several sums to *Maule*. On the 11th of *August*, 1803, the plaintiff and defendant appointed *George Lyon* their joint agent, to contract for the sale of the land, who removed to, and resided upon or near the land, until 1807. The contracts with the settlers were made in the joint names of *Winter* and *Livingston*. In *October*, 1804, the plaintiff himself went on the land, and, whilst there, cancelled the contracts made by the agent in the joint names of *Winter* and *Livingston*, and gave deeds and took mortgages for the land conveyed, in his own name, and from that time held himself out, and acted as the sole proprietor of the land, and on the 13th of *March*, 1807, conveyed large portions of the tract to two different persons, and assigned them the bonds and mortgages which had been taken on the sale of parcels of the land included in their deeds. The judge thinking that the consideration for the notes had failed, the plaintiff was nonsuited, and it was now moved to set aside the nonsuit.

*D. B. Ogden*, for the plaintiff.

[ \* 56 ]

\**Hoffman*, and *Anthon*, contra.

*Per Curiam*. The motion for a new trial must be denied. The facts in the case clearly show that no consideration has been paid for the notes. Without going into a minute detail of these facts, they will, on examination, be found satisfactorily to show, that the defendant being indebted to *Thomas Maule* in a large sum of money, a patent for land, to which the defendant was entitled, was taken out in *Maule's* name; and by a subsequent arrangement between the parties, these lands were conveyed by *Maule* to *Winter*, on his becoming security for the debt which the defendant owed to *Maule*; and the notes in question were given as the consideration for the reconveyance of the land by *Winter* to *Livingston*, according to the covenant entered into between them. By this covenant, however, it was provided, that the agreement was to be void, unless *Livingston* paid his notes as they fell due. He did not pay them; and, of course, the agreement was void, if *Winter* elected so to consider it. And the case fully shows, that he availed himself of this forfeiture, for he went on and sold the land for his exclusive benefit, and *Livingston* has, therefore, received nothing for his notes; and *Winter* has a complete perfect title to the lands.

Motion denied

ALBANY,  
January, 1816.WILT and GREEN *against* OGDEN.

WILT

v.

OGDEN.

THIS was an action of *assumpsit*, which was tried at the *Toga* circuit, in June, 1815, before Mr. J. Yates.

The plaintiffs declared on an agreement or promissory note, made by the defendant to pay the plaintiffs 270 dollars, in drawing plaster, at 4 dollars and 50 cents per ton, from *Quiggs*, in *Ithaca*, to *Owego*, and also for goods sold and delivered.

\*The execution of the note having been admitted, the defendant, at the trial, offered to prove, that he had been to one *Quiggs*, in *Ithaca*, for the purpose of drawing the plaster, but that the plaintiffs had no plaster there. The plaintiffs' counsel objected to the testimony, on the ground that it was inadmissible under the general issue, but the objection was overruled by the judge; and the defendant proved that when he called on *Quiggs*, for the plaster, he declined delivering it; that, afterwards, it was taken away by the plaintiffs, and, on the defendant's calling again for the plaster, it had all been delivered. The judge gave it as his opinion, that, upon this evidence, the plaintiff could not recover upon the note.

The plaintiffs then offered to prove that the original consideration of the note was for a pair of horses, sold by the plaintiffs to the defendant, and, offering to abandon the counts on the note, claimed to recover the value of the horses on the other counts; but the judge refusing to admit evidence for that purpose, the plaintiff suffered a nonsuit, with leave to move the Court to set it aside.

The case was submitted to the Court without argument.

*Per Curiam.* The principal question, in this case, is, whether the defence set up on the part of the defendant, and received by the judge, was admissible under the general issue. The note upon which the action is founded, was to be paid in drawing plaster from *Ithaca* to *Owego*, and the defence was an offer of performance on the part of the defendant. From the testimony it very satisfactorily appeared that every thing was done by the defendant, which could be required of him, towards a performance of his contract, and that the non-performance was attributable solely to the neglect or default of the plaintiffs. This defence was proper and admissible under the general issue; it went to show that the plaintiffs never had any cause of action against the defendant. The contract necessarily implied that the plaintiffs were to have the plaster at *Ithaca*, ready to transport. This was in the nature of a condition precedent, and, from the evidence, it appears not only that the defendant went

Where an action is brought for the non-performance of a contract, the defendant may show, under the general issue,

[ \* 57 ]

that he offered to perform his part of the contract, but was prevented by the act of the plaintiff. (a)

Where *A.* sells and delivers goods to *B.*, for which *B.* is to pay in work and labor, and *A.* brings an action against *B.* on the agreement, which is defeated, by proof that *B.* had offered to perform his part of the agreement, but was prevented by the act of *A.*, *A.* will not be permitted to waive the agreement, and recover back from *B.* the original consideration. (b)

(a) *Vid. Dubois v. Del. and Hudson Canal Co.* 4 *Wendell's Rep.* 285. *Burton v. Steer* art. 3 *Ibid.* 236. *Williams v. Walbridge*, *Ibid.* 415. *Frost v. Everett*, 5 *Cow. Rep.* 497.  
(b) *Champlin v. Butler*, 18 *Johns. Rep.* 169

ALBANY,  
January, 1816.

MAURI  
v.  
HEFFERNAN.  
[ \* 58 ]

repeatedly for the purpose of transporting the plaster, the delivery of which was refused, but that for some weeks before the expiration of the time limited for the performance, the plaintiffs had no plaster at *Ithaca*. Any matter which shows that the plaintiffs never had any cause of action may be \*given in evidence under the general issue; and, at this day, most matters in discharge of the action, which show that, at the time of the commencement of the suit, there was no subsisting cause of action, may be taken advantage of under this issue. (1 *Chitt. on Plead.* 472.) If the evidence was admissible under the general issue, it is not pretended that it did not amount to a defence against the counts upon the note itself; and if so, there can be no color for the claim of the plaintiff to waive the note, and recover back the original consideration. Here is no failure of proof of the special contract: it is proved precisely as laid in the declaration; and to allow the plaintiffs to waive it, and recover back the consideration, would be permitting them entirely to change the contract, and recover in money when payment was to be made in the performance of services; and this, too, without any default on the part of the defendant: Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

### MAURI against HEFFERNAN.

The defendant entered into an obligation with the plaintiff, as his surety, at *Caraccas*, which not being performed, the plaintiff, the surety, was compelled, by proceedings at law, to pay the amount for his principal: in an action by the surety against the principal, it [ \* 59 ]

THIS was an action of *assumpsit*, brought to recover money paid by the plaintiff, as surety for the defendant. The cause was tried at the *New-York* sittings, in *May*, 1815, before his honor the chief justice.

The defendant entered into a contract with the royal administration of tobacco, at *Caraccas*, for the purchase and exportation of a large quantity (1,500 quintals) of tobacco, which was an article of royal monopoly, and could only be purchased from the government, or its agents. He, afterwards, executed a bond or obligation, with the plaintiff as his surety, to the royal administration, to secure the payment of the value of 956 quintals and 93 pounds tobacco, described in the bond as the remainder \*of the 1,500 quintals previously contracted for. The bond was as follows: "In the city of *Caraccas*, on the 18th (which, according to the laws of the *Spanish* colonies, was made before a notary, who kept the original, and delivered copies to the parties,) authenticated according to the laws of *Spain*, connected with evidence that the original could not be procured, and with proof of admissions, by the defendant, of its authenticity, and of the breach of the contract, was sufficient without producing the decree against the plaintiff, and the original obligation, or a sworn copy of it.

Where a contract has been broken, the surety may pay the money without suit, and recover against his principal.

A party who would excuse himself from responsibility, on the ground that he acted as the agent of another, ought to show that he communicated to the other party his situation as agent, and that he acted in that capacity, so as to give a remedy over against his principal. (a)

(a) *Sewall v. Fitch*, 8 *Conn. Rep.* 215. *Stone v. Wood*, 7 *Ibid.* 453.

day of *November*, in the year of our Lord 1805, before the chief notary of the administration of tobacco, and before the witnesses hereunder written, personally appeared in his dwelling-house, *Don Pedro Edwardo*, of this place, merchant, to me known, who declared that *Mr. John Heffernan*, citizen of the *United States of America*, and resident in the port of *Laguaira*, hath constituted him his attorney for the execution of this written instrument, which he is to execute with *Don Jose Mauri*, his surety, or with his certain attorney, in his name, to answer for the value of 956 quintals and 93 pounds of dry cured tobacco, now in *Puerto Cabello*, the remainder of 1,500 quintals contracted for with the administration, by said *Heffernan*, on the 13th day of *July*, in the present year, for the value of which he is to answer in one month from the date of this instrument of surety, which said power of attorney he has exhibited to me, and which is as follows, to wit. (Here the power of attorney from *Heffernan* to *Edwardo* is set forth in *hac verba*.) *Don Jose Carbonel*, also personally appearing, said, that *Don Jose de Mauri*, having become surety for the aforesaid *Heffernan*, has given to him a power, constituting him his attorney for the execution of said written obligation and deed, which he exhibited to me, and whose tenor is literally as follows. (Here the power from *Mauri* to *Carbonel* is set forth.) And making use of the faculties by said powers upon them conferred, in the names of their principals, they renounce, &c. (the benefit of certain laws;) and *Don Jose Carbonel*, in the name of *Don Jose Mauri*, said, that he recognizes and constitutes him such security and principal payer of the sum to which the aforesaid 956 quintals and 93 pounds of tobacco, dry cured, may amount, binding him jointly with *Mr. Heffernan*, who to the same is bound by his attorney, *Don Pedro Edwardo*, jointly, and in *solidum*, to be paid, in case of non-compliance with the stipulations of the contract aforesaid, renouncing, as they have expressly renounced in the names of their principals, and under the conditions stipulated, which are, first, that the tobacco aforesaid shall be exported as soon as possible. Secondly, that the said tobacco shall be examined, weighed, and marked, as quick as possible, in the stores of the king, the dangers of robbery and fire being on account and risk of the royal administration; and on account and risk of their principals, the damage \*which may occur to said article from their delay in exporting it, together with storage. Third, that within ten days after the delivery of said tobacco for loading, the value of which shall appear from the invoice to be made out at the time of the acknowledgment and delivery must be paid. Fourth, that in case government should prohibit the entry of the vessel, which is to come in ballast, to take off the remainder of the tobacco in *Puerto Cabello*, that then all responsibility shall cease, and the contract shall also be considered null, and the royal administration be answerable for the damages thereby occasioned, under which condi-

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN

[ \* 30 ]

ALBANY,  
January, 1816.

MAURI  
v.  
HEFFERNAN.

tions, and the terms aforesaid, Don *Pedro Eduardo*, and Don *Jose Carbonel*, renounce, &c. (the benefit of certain laws.) For the due observance of which the aforesaid Don *Pedro Eduardo*, and Don *Jose Carbonel*, bind the persons of their principals, their property and effects, which they now have, or which they may in future acquire, granting, in the names of their principals, full power, as is by law required, to the judges and justices of his majesty, to compel them to the due observance and fulfilment of this instrument in writing, by executive measures, as if judgment were already given thereupon, renouncing, &c. In testimony whereof they executed and signed the same for their principals, in the presence of *Manuel Lopez*, Don *Pedro Guzman* and Don *Juan Hustado*, of this place, and which I attest. *Pedro Eduardo*, *Jose Carbonel*. Before me, *Matteo de Amitesarona*, notary of the royal administration."

Six or eight months after the execution of this obligation, a decree was passed against the plaintiff, by the intendant, for the amount of the tobacco specified in the contract, and by the influence of the plaintiff's friends, the execution of the decree was delayed for two years, when the plaintiff, being informed by the king's assessor, that it was impossible longer to delay the execution, presented a petition to the intendant for leave to pay the amount by monthly instalments, and, in the mean time, to be allowed to export the tobacco. On this petition it was ordered that the plaintiff be permitted to export the tobacco upon giving further security for such payments, whereupon *Roman Perez de la Portella* was offered and accepted as security, and *Joseph Paccanius Y. Nicolan*, (whose deposition was read at the trial,) at the plaintiff's request, undertook to pay the instalments as they might fall due, and he accordingly did pay into the royal treasury, in five different instalments, the sum of 20,518 dollars and 7 reals, in discharge of the said obligation; the last of which \*payments was made the last of *August*, or beginning of *September*, 1808. The discharge of the bond was as follows:—

"*Caraccas*, 17th day of *September*, 1808. On this day, before me, at the request of Don *Jose Mauri*, his excellency the intendant, with the advice of the assessor-general, ordered the instrument in front to be cancelled, said *Mauri* having paid the sum of 20,518 dollars and 7 reals, which thereby appears to be due by *John Heffernan*, and said *Mauri* paid the sum, as security, according to the representation of the administrator-general; and that the same may be no longer of any force, I note the payment thereof, in conformity with a decree issued this day; which documents will be found in the bundle of vouchers which I sign and attest *Amitesarona*, notary. It agrees with the original, which is in the register, under my care; and to deliver the same to the concerned, I caused this copy to be made, which I sign in *Caraccas*, on the 26th day of *September*, in the year 1808. *Matteo de Amitesarona*, chief notary of the royal administration." "We, citizens *Jose Feliz de Arauda*,

treasurer to the army, and *Diego Jugo*, minister of the revenues, in this port, and *Andres Martinez*, fiscal notary, &c., certify, that citizen *Matteo Amitesarona*, by whom the preceding documents are authorized, is the chief notary of the administration of tobacco, and that to his instruments entire faith and credit are given, both in Courts of judicature and elsewhere. In testimony whereof, the present is given, in the port of *Laguaira*, on the first day of *November*, 1811. *Jose Feliz de Arauda*, *Diego de Jugo*, *Andres Martinez*."

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

On the bond and cancelment being produced at the trial, the defendant's counsel objected, that the original obligation ought to be produced and proved, or that a copy, sworn to, and compared with the original, should be produced. The plaintiff, thereupon, proved, by *Don Mariano Velasquez*, who had received the degree of doctor in the civil law, at *Madrid*, that, by the laws of *Spain*, and her colonies, all contracts are executed before a notary, and remain with him of record, who gives to the parties certified copies, under his signature; that the copies, thus authenticated, are read in all Courts and tribunals where the *Spanish* laws prevail; and if used in the place where the notary resides, his single attestation is sufficient; but, if used in other places, his attestation is verified by the attestation of two other notaries, or two king's officers, who certify the notary's \*hand-writing. The witness stated, that the paper produced was in due form, according to the laws of *Spain*, and her provinces, to entitle it to be read in evidence in the *Spanish* Courts. The chief justice permitted it to be read in evidence. There was other evidence as to the law of *Spain*, on this point, as to the authenticity of these documents, and of the signatures to them, which it is unnecessary to state.

[ \* 62 ]

*Paccanius*, in his deposition, in addition to the foregoing facts, stated that, being about to come to the *United States*, he was charged with the adjustment of the plaintiff's claims against the defendant, and, soon after his arrival at *New-York*, had several personal interviews with the defendant, on the subject, and left with him the plaintiff's account, containing a charge of 20,518 dollars and 87 cents, paid to the royal administration of tobacco, at *Caraccas*, as security for the defendant. In these conversations, the defendant did not dispute the justice of the plaintiff's claims, nor question the accuracy of any of the items contained in the account, and acknowledged that the plaintiff had entered into the contract as security for him; but insisted that, in all the transactions relating to the tobacco, he had acted as the agent, and on the behalf, of *Frederick Baker*, and that the plaintiff ought to look to *Baker* for payment. The deponent exhibited to the defendant, among other papers, which, on examination, he admitted to be genuine and authentic, the copy of the bond, &c. which was given in evidence. In the course of conversation, the defendant told the deponent, that he had not sent a vessel to take away the tobacco, being apprehensive

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

that she would not be admitted, on account of *Miranda's* expedition.

The deposition of *Juan Yellas Y. Ferra* confirmed the statements, in *Paccanius's* deposition, respecting the tobacco contract, and the payment of it, and mentioned similar admissions which had been made by the defendant to him; and also stated, that the plaintiff sold the tobacco, after he had kept it for a long time, to a Mr. *Denker*, of *St. Thomas*, pursuant to the advice of respectable merchants. In the year 1807, or 1808, the deponent went to *St. Thomas*, on his own business, and carried with him an order from *Mauri*, on *Denker*, for the price of the tobacco; but it was publicly understood, at that time, that *Denker* had failed. *Denker*, afterwards, however, paid a part to *Mauri's* nephew, who was sent by *Mauri*, for the purpose. The deponent also stated, that he had no reason to imagine that \*the plaintiff, when he became surety for the defendant, was acting in the behalf of *John Serra*, (who was alleged by the defendant to have been the principal in the transaction,) or that the money that the plaintiff was compelled to pay, was paid out of the funds of *Serra*, or that the plaintiff was, in any manner, indemnified by *Serra*.

[ \* 63 ]

The plaintiff produced in evidence certain letters from the defendant to the plaintiff; in one of which, dated *February 7th*, 1806, the defendant says: "I shall despatch, towards the end of this present month, a vessel, if circumstances will permit, for the rest of the tobacco that I contracted for in *Puerto Cabello*; but, at all events, I shall take care to indemnify you from your suretiship to the royal administration of tobacco." In that of the 6th of *January*, 1808, he says: "I am very sorry that you, and Don *Pedro Eduardo*, have not annulled the contract that I foolishly signed for the sake of Don *Juan Serra*. My friend, be under no apprehension that you will, in any manner, suffer in the affair, notwithstanding that you were the agent or attorney of *Serra*: I am, and will be, the only victim." In another letter, of the 23d of *June*, 1810, he says: "At your convenience, you will do me the favor to inform me in what manner the affair of the tobacco, that they so perfidiously threw upon my shoulders, was adjusted, and whether you had to pay any thing, and how much; for, probably, before many months elapse, you will see me in your city; or, otherwise, I shall find a person, in whom I have full confidence, to see you, for the purpose of settling and clearing up the unfortunate affair, and of claiming from the contractors what they owe. Repetitions are useless; but you will perfectly remember the manner in which they deceived me, when, in presence of yourself and Don *Manuel*, the contract was made with Don *Juan Serra*, in his own name, and in that of the intendant and *Linares*, for two cargoes, which I afterwards sent, consigned to you, as agent or attorney of *Serra*, and, according to agreements, presuming that they would perform it with good faith."



On the part of the defendant, the deposition of *Francis Gonzales de Linares* was read; the deponent stated, that he was acquainted with *John Serra*, of *Caraccas*; that, in the month of *July*, 1805, according to the best of his recollection, *Serra* departed on a voyage from *Laguira* to *Old Spain*, and afterwards returned, but, during his absence, the plaintiff acted as his agent; \*and that the plaintiff was the agent of *Serra*, generally, at *Laguira*. [These facts were confirmed by the depositions previously read on the part of the plaintiff.] That the defendant was at *Caraccas* some time in the month of *June*, or *July*, 1805; that, soon after, the defendant left *Caraccas*, on a voyage to *New-York*; the object of which was, as the deponent understood, to take, from *Caraccas* to *New-York*, colonial produce, in which the proceeds of a certain shipment, made by *Baker* and *English*, of *New-York*, was invested; and that the defendant acted as the supercargo of the said shipment, and as the agent of *Baker* and *English*. The deponent recollected the arrival of the ship *Catharine* at *Laguira*, from *New-York*, in the summer of 1805, with, as he understood, a cargo of dry goods, consigned either to the plaintiff, or *Serra*, as his agent; he did not know who was the consignee; the ship was not immediately permitted to enter, but was, for some days, prevented, in consequence of the port being, at that time, shut against the admission of foreign vessels. The deponent remembered the arrival of the ship *Stranger* at *Laguira*, from *New-York*, with a cargo of merchandise, some time in the month of *July*, 1805, which was consigned either to *Serra*, or the plaintiff, as his agent; but he did not know who the consignee was; nor did he recollect whether the ports were open on the arrival of the *Stranger*, but he thought that they were, and that she was admitted immediately to enter. There was a contract between the defendant, *Serra*, and the deponent; to which contract, *Serra* represented to the deponent, the intendant at *Caraccas*, *Don Juan Vicente de Arce*, was a party, the particulars of which he did not recollect; but it was, generally, for the importation of merchandise from the *United States* to *Laguira*, and the exportation of produce in return; and it was agreed that, in case the merchandise, or any part thereof, should arrive when the ports were shut, every facility should be given to *Heffernan*, by the other contracting parties, for its immediate admission. Two days after the contract was entered into, the deponent declined any further participation in it. The deponent stated, that the contract made respecting the tobacco, was entered into for the purpose of facilitating the admission of the merchandise contemplated to be imported into *Laguira*, in pursuance of the before-mentioned contract. The deponent understood from *Serra*, before he went to *Spain*, that he had left the plaintiff full powers to act \*as his agent, generally, and that those powers had particular reference to the before-mentioned contract; the defendant appeared and acted, in these transactions, as the agent of *Baker*

ALBANY,  
January, 1816.MAURI  
V.  
HEFFERNAN.

[ \* 64 ]

[ \* 65 ]

ALBANY,  
January, 1816.

MAURI  
v.  
HEI FERNAN.

and *English*. The cargoes of the ships *Catharine* and *Stranger* were landed, and put in the plaintiff's stores, and the plaintiff had the general management in making the sales.

The deposition of *William M Conehey* was read, in which he stated that, in *June*, 1805, he went out as supercargo of the *Stranger*, on a voyage from *New-York* to *Laguira*; that he was employed by *Frederick Baker* and *Jacob Barker*, but that the papers were in the name of *Barker*. The cargo was consigned to the defendant, but the deponent was directed to address himself to *John Serra*. The *Stranger* was not permitted to enter the port until three days after her arrival; and on the deponent asking the defendant how he came to be so fortunate as to get permission for the ship to enter, he replied, that he was obliged to go through the formality of making a sham purchase of tobacco. The cargo was received by the plaintiff, whom the deponent understood to be acting as agent of *Serra*. After the *Stranger* had delivered her cargo, she went round to *Puerto Cabello* to take in some tobacco, as the deponent understood, that it was necessary to take in some, as a colorable compliance with the contract of purchase made by the defendant; and they were not compelled to take more than five hundred and twenty quintals; and it was frequently intimated to the deponent, by the king's officer, that he need not take more than he liked. In 1806, the deponent went again to *Caraccas*, and took with him a power of attorney, from the defendant, to himself and *Don Pedro Edwardo*, for the purpose of settling, among other matters, the tobacco contract with the plaintiff. The defendant, under this authority, offered the plaintiff one thousand dollars as a full settlement of all claims he might have against the defendant, on the subject of the tobacco contract, or of the plaintiff's being security therein, and stated to the plaintiff, that he had, in truth, no claim on the defendant on that account, as the defendant was only acting as the agent of *Baker* and others, and as he, the plaintiff, was acting as the agent of *Serra*. The plaintiff, in this conversation, distinctly admitted his knowledge that the defendant had only acted as the agent of *Baker* and others, and that he, the plaintiff, acted as the agent of *Serra*, and required 3,000 dollars, and two thirds of the commissions, for the tobacco contract, neither of which the deponent was authorized to give; (it being usual, at *Laguira*, for the *Spanish* merchant who does the business, to allow the supercargo one half of the commissions.)

[ \* 66 ]

The deposition of *Moses Hillard* was also read, on the part of the defendant, who stated, that about *May*, 1805, he went, as master of the ship *Catharine*, on a voyage from *New-York* to *Laguira*, and the defendant accompanied him as supercargo. The vessel appeared, by the ship's papers, to belong to *Frederick Baker*, who also employed the deponent, and was informed by *Baker*, that he and one *John English* were jointly interested in the cargo, which, on its arrival at *Laguira*, was to be put into 60

the hands of one *John Serra*; and that the voyage was undertaken in consequence of some agreement which had been made between the defendant and *Serra*. When the deponent arrived at *Laguira*, *Serra* was there, and about to sail for *Europe*; the plaintiff did the business of the vessel, and disposed of the cargo. The plaintiff was generally understood, at *Laguira*, to be the agent of *Serra*. The deponent, before he left *New-York*, understood from *Baker*, that another vessel, with a cargo, was also to sail on the same voyage, under the same contract made between the defendant and *Serra*. About a month after the *Catharine* arrived, the ship *Stranger* also arrived at *Laguira*, and was refused an entry for two or three days, but was at length admitted, and the cargo put into the hands of the plaintiff.

The chief justice charged the jury, that he thought the testimony, in the cause, warranted the conclusion that the plaintiff had paid the amount of the bond for the defendant; that it appeared that, in some transactions, the defendant had been the agent of *Baker* and *English*, and that, in some transactions, the plaintiff had been the agent of *Serra*; but that there was not sufficient testimony to show that, in the transaction relating to the tobacco, the defendant acted as the agent of *Baker* and *English*, or the plaintiff as the agent of *Serra*. Besides, if a party would excuse himself from responsibility, because he acted in the capacity of agent, he ought to show that he communicated to the other party his situation as agent, and that he acted in that capacity only, so as to give a remedy over against the person whom he represented to be his principal. That in a \*case like that of the tobacco transaction, the plaintiff's becoming security for *Serra*, was not within the scope of the authority of a general agent appointed for commercial purposes.

The chief justice further charged the jury, that if they thought that the plaintiff had misconducted himself, or acted contrary to the custom of the place, in selling the tobacco to *Denker*, they must deduct so much from the plaintiff's demand, because the plaintiff must conform himself to the usage of the place. [Evidence was given, on the trial, respecting the usage as to selling to foreign merchants on credit, which not being referred to in the opinion of the Court, it was thought unnecessary to state.]

The jury found a verdict for the plaintiff for 14,808 dollars and 21 cents.

A motion was made to set aside the verdict, and for a new trial.

*Hoffman*, for the defendant, examined the facts, in the case, at large, and contended, that in all the transactions relating to the outward and return cargo of the *Stranger*, the plaintiff acted as the agent of *Serra*, and knew that the defendant acted as the agent of *Baker*; that the tobacco was, in truth, pur

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

[ \* 67 ]

ALBANY,  
January, 1816.

MAURI  
v.  
HEFFERNAN.

chased by the plaintiff, as agent of *Serra*, and for his benefit, though the plaintiff's name, and the formality of giving security, were used, as the best mode of conducting the transaction; that the accounts were incorrectly stated, without distinguishing what belonged to the parties as principals, and what as agents.

That it did not appear that the plaintiff had ever paid *Paccanius* the money he stated that he had advanced, so as to be entitled to bring this action.

That, by selling the tobacco without apprizing or consulting the defendant, the plaintiff took it on himself, and thereby waived any demand, on account of it, which he might, otherwise, have had against the defendant.

That the *notarial copies*, or certificates, admitted at the trial, were not legal or proper evidence. In this country, and according to the rules of our law, notarial certificates are not evidence, except to prove the protest of a bill of exchange, or proceedings in admiralty Courts.

It is true that, in countries where the *civil law* prevails, all contracts are made before a notary, who delivers to the parties copies, certified by him, under his hand and seal. In those countries the copies may be evidence; but the *lex loci*, though it may govern as to the contract itself, is not the rule of evidence by which the contract is to be proved in the country where the action is brought, and where the proof of the contract must be given. Different countries and states may establish very different rules of evidence. In *Massachusetts* and *Connecticut*, the oath of the party is received in an action of law, in support of his demand. In *Pennsylvania*, the *protest* of a master of a vessel, made before a notary, is received to prove the loss in an action on a policy of insurance. But such evidence is not admissible here.

There ought, then, to have been a commission taken out to examine the notary; and if the original contract could not be obtained, the copy should have been verified, by a comparison with the original, all which might have been shown under a commission. It appears, also, that the contract was executed by the plaintiff, by his attorney, *Carbonel*, and the only evidence of any power of attorney, is the same notarial certificate. The originals are not exhibited, nor the copies verified. The notary certifies facts. He does not set forth the contract *in hac verba*. He speaks in the past tense, and narrates facts. His certificate is not a record, nor a copy of a record. If these contracts are, as is said, always kept by the notary on record, there ought to have been an exemplification of that record, or a copy under seal. In cases under the law of nations, it is true, copies of proceedings of the Admiralty Court, under seal and signature, are admitted, on proof of the seal, &c.

Again; the plaintiff alleges he paid the money in pursuance of a decree of a *Spanish* tribunal at *Caraccas*. It was essential, therefore, for him to prove this decree by legal evidence

The bond was not for any particular sum; and it was requisite to show how the value of the tobacco was liquidated, for which the surety was made liable. If the liquidation was voluntary, on the part of the surety, he ought to show that it was fairly and honestly made. The only evidence of the decree is this same notarial certificate, without any oath or verification whatever.

ALBANY,  
January, 1816.

MAURI  
v.  
HEFFERNAN.

*Slosson, and Caines, contra.* 1. As to the admissibility of the documents offered in evidence. The powers are set forth *verbatim* in the notarial certificate, and which is, in fact, a copy or exemplification of the record. The Court must be satisfied of the genuineness of every paper offered in evidence. For this \*object, it is enough to show, first, that the original cannot be produced, and, next, that the paper or copy offered, as its substitute, is true, or properly verified. Though, when the paper is first offered, the Court may have doubts of its authenticity, yet if, by the subsequent proofs in the cause, its verity is satisfactorily established, the Court will not direct a new trial. The granting a new trial is in the sound discretion of the Court, and stands on different grounds from exceptions taken to the evidence. In countries where the *civil law* prevails, the contracting parties go before a notary, who takes down their declarations, and draws up the contract in form, which he keeps, and delivers copies to the parties, which are, in truth, originals and counterparts of the contract. The notary is the *proper officer* to give certified copies. This Court has said, that the certificate of a clerk was equivalent to an affidavit,<sup>†</sup> because he is the proper officer. In *Duncan v. Scott*,<sup>‡</sup> Lord *Ellenborough* held, that copies of depositions delivered by a judge's clerk, being in the course of office, were *prima facie* evidence, without being proved to be examined copies. In *Miller v. Livingston*,<sup>§</sup> it was held that, where the originals could not be had, copies were admissible in evidence; it is true, such copies must be duly authenticated. Here we have the confession of the defendant himself, that the documents produced were genuine. This confession of the party is equivalent to the production of the subscribing witness to an instrument.|| The admission of the copy implies the genuineness of the original. What higher evidence of the truth of these copies could have been obtained under a commission? The defendant, having a notarial copy of the same contract, cannot allege that he is surprised by the copy produced at the trial.

In *Walrond v. Van Moses*,<sup>¶</sup> it was decided, that a copy of an agreement registered in *Holland*, and attested by a *public notary* there, might be given in evidence for the defendant; especially as the plaintiff had taken out another copy of the same agreement, and would not produce it; for he would not be surprised, as he must have known of the agreement, having himself a copy of it.

[ \* 69 ]

† 1 *Caines*.  
59. 6 *Johns*  
*Rep.* 286.

‡ 1 *Camp. N.*  
*P.* 101.

§ 1 *Caines's*  
*Rep.* 349.

|| 2 *Johns*.  
*Rep.* 452.

¶ 8 *Mod.* 322

ALBANY,  
January, 1816.

MAURI  
v.  
HEFFERNAN.

[ \* 70 ]

2. The deposition of *Paccanius* fully establishes the fact of the payment of the money, by the judicial decision or decree of the Court at *Caraccas*.

\*3. If the defendant intended to shelter himself under the character of a mere *agent*, he ought to have shown that he disclosed to the plaintiff, at the time the contract was made, the capacity in which he acted; and that he made known his principal, fully and explicitly, so as to enable the plaintiff to resort to the principal. The evidence is, that the defendant, in the case of the *Stranger*, was the agent of *Baker* and *Barker*, and in the case of the *Catharine*, the agent of *Baker* and *English*. If the plaintiff had applied to *Baker* and *Barker*, they would have said, "This is not our contract; Mr. *H.* has blended the business of others, with whom we have no concern; you must look to him." The plaintiff could not sue one set of principals for one part, and another set of principals for another part of the contract. But the evidence shows, that the defendant did not pretend to act as *agent* in this contract. It was entered into between him, as principal, and the plaintiff as his *surety*. Though a person is an agent, he may still assume individual and personal responsibility relative to the subject of his agency.†

† 1 *Term Rep.*  
191.

Where an agent, without disclosing his principal, or, which is the same thing, does not disclose all his principals, where there are more than one, makes a contract, he is himself to be treated as principal.‡

‡ *George v.*  
*Claggett*, 7  
*Term Rep.* 359,  
360, 361. n.

Again, the authority and duty of a *supercargo* is, to sell one cargo, and invest the proceeds in another, or return cargo. The entry of the cargo and vessel, at the custom-house, is the peculiar duty of the master. The defendant having gone aside from his duty as *supercargo*, to enter into this arrangement of the tobacco contract, in order to procure an entry, must be considered as having acted, in that respect, on his own personal responsibility.§ If the question of the defendant's acting as a mere agent, or not, rested on facts, it was for the jury to decide; and they have determined the fact. If it depended on the written documents produced, those documents clearly show that he acted as principal.

§ 3 *Johns.*  
*Cas.* 70.

Again, the factor and principal, or owner, may each sue for the same cause.|| Where a contract operates on two parties, each may sue; but if one sues, it is a bar to an action by the other; and if the owner, or principal, does not sue, the factor may bring the action.

|| 1 *Hen. Bl.*  
85. *Bull. N. P.*  
130. 3 *Caines*,  
72. *Cowp.* 255.

[ \* 71 ]

\*As to the sale of the tobacco, the plaintiff was compelled, *ex necessitate*, by the very act of the defendant, to become his agent as to the tobacco, a perishable article, which he sold, and gave the defendant credit for the net proceeds. This cannot be considered as any waiver of his claims for indemnity under the contract.

¶ *Sluby v.*  
*Champlin*, 4  
*Johns. Rep.* 461.

A surety is not bound to stand a suit, but may pay the money in the first instance, and then call on the principal.¶

*T. A. Emmet*, in reply. The declaration, in this case, contains only the usual money counts. The plaintiff must show that he actually paid money for the defendant, not that another person paid it. Where owner and factor both have actions, they must be special actions on the case.

ALBANY.  
January, 1816.

MAURI  
v.  
HEFFERNAN.

To understand this case, it is necessary to examine the facts minutely. [Here the counsel examined and remarked on the facts at length.] The tobacco contract was subsidiary to the other, and made in the name of the defendant, but, in truth, for the benefit of *Serra*. It was to facilitate the entry of the *Stranger*; and the plaintiff must have known that the defendant was not acting on his own account, or for his own benefit. The letter of the plaintiff shows this. It is said, the defendant did not disclose the names of his principals; but the plaintiff had the invoice of the cargo, and must have known them.

It is true, in regard to foreign trade, that a *factor* may be sued because he is on the spot, and his principal, or owner, being abroad, cannot be reached. This rule, however, founded on the convenience of trade, does not apply where both factor and owner reside abroad.

Again, according to the necessary course of this trade, carried on at *Caraccas*, agents there must act in their own names, and appear as principals, in order to keep others out of view.

The confessions of the defendant amount to nothing. They are, in substance, this: "I do not dispute the *items* of your account; I put my defence on higher ground; that I am not liable at all, having acted merely as the agent of *Baker*, to whom you must look."

All subsequent engagements, by letters, are *nude pacts*, or, if the defendant is to be made liable on them, it cannot be in this action, but on special counts.

Again, the extent of the obligation of the plaintiff, as surety, \*was indefinite and unlimited. It was absolutely essential, therefore, that he should show, by satisfactory evidence, how the amount was liquidated and ascertained. The decree of the Court ought to have been produced.

[ \* 72 ]

Further, there is no evidence that the plaintiff has ever paid *P.* the money he swears he advanced. *P.* does not say that the plaintiff ever paid him a cent.

Then, as to the admissibility of the documents, or notarial certificates, in evidence. In *Smith v. Spinolla*, the very point was decided, though the case does not appear to be reported. (a) In *Downes v. Mooreman*,† it is stated, that "a copy of an agreement between the abbot of *Huarrer* and the monks of *Lyra*, was produced in evidence; to which it was objected, for the

† *Bunb. Rep.*  
190, 191.  
*Wynch*, 70.

(a) The judge, before whom the cause was tried, having refused to grant an order to stay proceedings, the counsel delivered to the Court a copy of the case, with a written argument, though the Court do not hear arguments on an appeal from the judge, or for an order to stay proceedings; and there being no stay of proceedings, the cause was not heard in Court.

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

- plaintiff, that, by the rules of evidence, it could not be read, being neither a record nor a public thing. But the defendant produced a copy of the statute of *Oxon*, that no book, &c. should go out of the *Bodleian* library; and the Court gave leave to read the copy of the agreement in evidence; though they admitted it not to be within the general rules of evidence, but on the very particular circumstances of the case." Here it was expressly
117. shown that the original could not be obtained;† and it was admitted, that to allow a copy, even in such case, to be read, was against the rules of evidence. As to the case of *Walrond v. Van Moses*, it is remarkable that it has never been cited, to that point, in any abridgment of the law, or in any treatise on evidence; nor is there any subsequent case to be found grounded on its authority. Besides, in that case, each party had a copy of the original.

It appears, in this case, that a copy only of the power was exhibited to the notary, and he gives a copy of a copy, without any verification by the original. Three citizens certify, that the person who gives the certificate is a *notary*; there is nothing more. The original and the copy do not appear to have been compared.

Under a commission, the party could go into an examination of all the circumstances attending the execution of the instrument. But if notarial certificates, or copies, are admissible, a party may be surprised at the trial, and have no opportunity to \*show any circumstances attending the execution of the instrument, or that it was a forgery.

[ \* 73 ]

THOMPSON, Ch. J., delivered the opinion of the Court. The right of the plaintiff to retain the verdict, found in his favor, will depend principally upon the question, whether there was competent and sufficient evidence of his having become security for the defendant, and that he had paid the money alleged to have been paid on that account.

It is unnecessary to examine minutely the proof that was before the Court at the time application was made for a nonsuit; for, admitting there was not evidence enough, at that time, to warrant a recovery, yet, if the deficiency was afterwards supplied, and there was proof sufficient to support the verdict when found, the present motion cannot prevail.

With respect to the instrument, by which it is alleged that the plaintiff became security for the defendant, the proof is abundantly sufficient to show that the *original* could not be produced upon the trial. According to the laws of the *Spanish* province, where this instrument was executed, the original, or the one actually signed by the parties, remains with the notary before whom it was executed. Copies, certified and signed by the notary, are delivered to the parties; and such copies, thus authenticated, are received in evidence in all the *Spanish* tribunals.



It is unnecessary definitively to say, whether the *lex loci* ought so far to prevail, as to require these notarial copies to be admitted in evidence here, in the same manner as in the *Spanish* tribunals. I am inclined to think, however, they ought not to be received as sufficient, *per se*; but I cannot think they are to be entirely disregarded, and treated as mere nullities. They ought to be received as forming a part of the inferior evidence of the execution of the instrument, when the original cannot be produced and proved. It appears to be a part of the official duty of the notary to give copies; he is specially intrusted with that power; and, in giving such copies, he acts under his oath of office. The instrument is executed before him in his official capacity; and an official certified copy necessarily implies that he saw the instrument executed. In what respect does this differ from an examination upon a commission? He can only swear he saw the instrument executed, and that the copy furnished by him is under oath. Besides, we ought to be cautious \*in declaring that we will receive nothing short of the examination of the notary, under a commission, as there is no mode of enforcing such examination; nor is a sworn copy, proved by a person who has compared it with the original, any higher or better evidence than that furnished by the notary, which is a copy under his oath of office. But the evidence furnished in the case before us is more satisfactory than either, arising out of the repeated, uniform, and uncontradicted confessions of the defendant, contained in his letters, and to witnesses, whose testimony was before the jury. *Paccanius*, who, in behalf of the plaintiff, applied to the defendant for payment, swears that he showed him the documents given in evidence, which purported to be notarial copies of the instrument, whereby the plaintiff became security for the defendant; and the cancellation of the contract, upon the payment of upwards of 20,000 dollars by the plaintiff, as security for the defendant, in conformity with a decree of the *Spanish* tribunal; that *the defendant examined the papers, and, without any hesitation, recognized them as genuine and authentic*. In addition to this, he acknowledged to this witness, that the plaintiff had entered into the obligation on the tobacco contract, as security for him. This witness also exhibited to him an account, containing the charge of 20,518 dollars and 87 cents, paid to the royal administration of tobacco at *Caraccas*, as security for the defendant, and referring to the instrument executed on that occasion. The defendant did not dispute the justice of the plaintiff's claim, nor question the accuracy of any of the *items* contained in the account, but insisted only that he acted as agent, and in behalf of *Baker*; and that the plaintiff ought to look to him for payment. To *Serra*, another witness, the defendant acknowledged that the plaintiff was bound as security for him. This witness also confirms the testimony of *Paccanius*, with respect to the defendant not disputing any of the items contained in the account present

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

[ \* 74 ]

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN.

[ \* 75 ]

ed to him. These acknowledgments furnish evidence of an express admission that the copies offered in evidence were genuine and authentic copies of the original, and serve to *identify* the instruments beyond all dispute. If any thing more could possibly be wanting, it is furnished by the defendant's letters. In the one of the 7th of *February*, 1806, he apprizes the plaintiff that he should send a vessel for the rest of the tobacco, and adds—but, at all events, I shall take *care to indemnify you for your suretiship to the royal administration of \*tobacco*. Again, in his letter of the 6th of *January*, 1808, he admits he entered into the tobacco contract, and tells the plaintiff to be under no apprehensions that he shall in any manner suffer in the affair. And, as late as 23d of *June*, 1810, he writes, that he had been made the victim in the affair of the tobacco, and wanted to be informed whether the plaintiff had to pay any thing, and how much; promising either to go himself, or send some person, for the purpose of settling the unfortunate affair. If the confessions of the defendant, either by parol or in writing, are at all to be received in evidence, they are amply sufficient, in this case, to show a due execution of the instrument whereby the plaintiff became his surety. This instrument was not under seal; so that no objection on that account can be made. I see no objection, nor, indeed, was any made on the trial, to the admissibility of such evidence. In the case of *Hall v. Phelps*, (2 *Johns. Rep.* 452.) it is said, that the confession of a party that he gave a *note, or any instrument precisely identified*, is as high proof as that derived from a subscribing witness.

That the plaintiff has paid upwards of 20,000 dollars on account of the breach of the defendant's contract with the *Spanish* government, is established, not only by the admission of the defendant, but by the positive evidence of *Paccanius*, who swears that he did, at the plaintiff's request, by his orders, and in his behalf, pay the money into the royal treasury, in pursuance of the decree. It was unnecessary to prove the decree as a breach of the contract, which the defendant made with the *Spanish* government, is fully shown by the admissions of the defendant. In his letter of *February*, 1806, he speaks of sending a vessel for the rest of the tobacco, if circumstances would permit; and he expressly admitted to *Paccanius* that he had not sent a vessel to take away the tobacco, being apprehensive she would not be admitted on account of *Miranda's* expedition.

If the contract was broken, it was not necessary for the plaintiff to stand a suit. If the liability of the surety, and a payment of the money by him, be shown, it will be sufficient to warrant a recovery against his principal.

In answer to all this, it has been urged that the plaintiff was the agent of *Serra*, and, therefore, has no right to recover on his own account, even admitting the defendant's liability to *Serra*; and, also, that the defendant was acting as the agent

of other persons, and cannot be made personally responsible, but \*recourse must be had to his principals. I cannot discover, from the evidence in the case, any thing to warrant, or even to give color, to the conclusion, that, with respect to the tobacco contract, the plaintiff was acting as the agent of *Serra*. The allegation of the defendant, to that effect, in his letter of *January*, 1808, is too vague to deserve any consideration; it is at variance with the contract itself, and with the general tenor of the defendant's conduct and confessions, and might very well have been an afterthought in the defendant, to endeavor to shift the loss from his own shoulders. Nothing is to be collected from the contract itself, to show that the plaintiff acted in behalf of *Serra*; nor is there any evidence that he represented himself to the defendant as such agent, when he entered into the security. If such had been the fact, there can be no doubt that it would have appeared upon the face of the contract. This the parties well understood, for they made the contract by their agents, as appears by the instrument, and the authority of the agents as set out. It is not to be credited that, if the plaintiff had authority from *Serra* to become surety for the defendant, he would not have appeared in that character in the transaction. There is no doubt that the plaintiff was the agent of *Serra*, during his absence in *Spain*, and there is considerable testimony tending to show that, in the sales of the cargoes of the *Catharine* and *Stranger*, he acted in behalf of *Serra*. But these were mercantile transactions, altogether distinct from becoming security for the performance of a contract in which *Serra*, from any thing that appears, had no interest or concern. If the defendant has procured the plaintiff to become security for him, in his own name, and he has been compelled to pay the money, it very illy becomes the defendant, now, to say he is responsible to *Serra*, and not to the plaintiff. Before the plaintiff is turned around to *Serra* for indemnity, it ought very clearly to appear that he has a remedy against him. If the plaintiff ever made the acknowledgment stated by *M<sup>r</sup> Conehey*, as to his being the agent of *Serra*, it must have related to a mercantile agency, and not to an authority to become security on the tobacco contract. At all events, this was matter for the consideration of the jury. *Ferra*, who appears, from his examination, to have been well acquainted with the circumstances in relation to the tobacco contract, and the payment of the money by the plaintiff, says he has no reason to imagine that the plaintiff, when he became surety for the \*defendant, was acting in behalf of *Serra*, or that the money which the plaintiff was compelled to pay, as such surety, was paid out of the funds of *Serra*, or that the plaintiff was in any manner indemnified by *Serra*; nor is the evidence sufficient to prove that the defendant acted as the agent of any person, in making the tobacco contract. The contract itself does not recognise him in that character; nor does the evidence show that, at the

ALBANY,  
January, 1816.

MAURI  
V.  
HEFFERNAN  
[ \* 76 ]

[ \* 77 ]

ALBANY,  
January, 1816.

CHAPMAN  
v.  
SMITH.

time of making the contract, he represented himself as such agent. No power was shown, giving him authority to make any such contract. It is hardly credible that the plaintiff would have become security upon the credit of others, without seeing some authority in the agent to pledge their responsibility. The defendant has not, even now, furnished any evidence that he had authority to make such a contract for *Baker*, or any other person. He went out as supercargo of the *Catharine*; but that did not vest him with authority to make the contract for the tobacco. It was totally unconnected with his duties as supercargo. Indeed, it is very uncertain now, from the evidence in the case, who were his principals; whether *Baker* alone, or *Baker* and *English*, or *Baker* and *Barker*; and the plaintiff would be entirely at a loss to determine who are his principals.

The correctness of the legal position stated to the jury, and by which they were to test the evidence, has not been questioned, that if a party would excuse himself from responsibility, because he acted in the capacity of agent, he ought to show that he communicated to the other party his situation as agent, and that he acted in that capacity, so as to give a remedy over against the person whom he represented as his principal. The testimony in this case furnishes no such evidence. The defendant, therefore, cannot excuse himself on this ground. It is unnecessary to travel through the various items of the accounts; for, if the defendant is at all answerable for the money paid on the tobacco contract, he is, at least, liable to the amount of the verdict found by the jury. And that he is so answerable, is, I think, very clear. The motion for a new trial must, accordingly, be denied.

Motion denied.

[ \* 78 ]

\*CHAPMAN against SMITH.

A declaration in slander, charging that in a certain cause before a Court of three justices of the peace, constituted under the act concerning appren-

THIS was a writ of error to the Court of Common Pleas of *Seneca* county. The declaration was for slander, and contained six counts.

The first count stated, that a prosecution had been depending before a Court of three justices of the peace of the county of *Seneca*, legally constituted, agreeably to the act entitled, an act

tices and servants, to hear and determine a certain cause between the people of the state of *New-York* and the defendant, the plaintiff was examined on oath, administered by the said Court, they having full power to administer the same, and had given evidence for and in behalf of the people; and that the defendant spoke of and concerning the plaintiff and the prosecution, and the evidence given by the plaintiff on the trial, and a point material to the prosecution, these words, 'You have sworn to a damned lie, and I can prove it,' is good; there being a sufficient averment of the jurisdiction of the Court; and the false title of the cause may be rejected as surplusage. (a)

(a) Vide *Ross v. Rouse*, 1 *Wendell's Rep.* 475. *Gilman v. Lowell*, 8 *Id.* 573. *Supra*, 48. *Niven v. Allen*.

concerning apprentices and servants, passed 20th of *February*, 1801, to hear and determine a certain cause between the people of the state of *New-York*, on the complaint of *Ebenezer Carterline*, jun., and the defendant below, which prosecution or cause had been lately tried, and the said *Smith*, the plaintiff below, had been, and was, examined on oath, administered by the Court so holden by the said justices, they having full power and complete authority to administer the same, and had given his evidence for and in behalf of the said people; and that the defendant below, well knowing, &c., and intending, &c., in a certain discourse which he had with the plaintiff below, in the presence and hearing, &c., spoke to, and of, and concerning the plaintiff below, and concerning the said prosecution, and concerning the evidence given by the plaintiff on the trial, and on a point material in and to the prosecution, these words: "You have sworn to a damned lie, and I can prove it."

The 2d, 3d, and 4th counts were the same, varying only the words charged.

The 5th and 6th counts not being noticed by the Court, it is unnecessary to state them.

The Court below gave judgment, generally, for the defendant in error, on the verdict. The cause was submitted to the Court, without argument.

SPENCER, J., delivered the opinion of the Court. It is objected, that, the judgment below being general, it ought to be reversed for defects in the four first counts; and if those counts are defective, the judgment cannot be supported.

The defects are supposed to consist in this, that it is not sufficiently alleged that the three justices had jurisdiction of the matter \*set forth in the *colloquium*; and that there is no averment that the matters sworn to by the plaintiff below were material. It is alleged in the declaration, in reference to the counts objected to, "that a certain prosecution had been depending before a Court of three justices of the peace of the county of *Seneca*, legally constituted, agreeably to the act entitled, an act concerning apprentices and servants, passed 20th of *February*, 1801, to hear and determine a certain cause between the people of the state of *New-York*, on the complaint of *Ebenezer Carterline*, jun., and the said *Titus Chapman*, defendant, and which said prosecution, or cause, had been lately tried at the town, &c.; and on such trial the said *Elkonah Smith* had been, and was, examined on oath, administered by the Court, so holden by the said justices, *they having full power and complete authority to administer the same*, and had given his evidence for, and on the part and behalf of the said people, at," &c. The declaration then states, that the defendant below spoke and published, to, and of, and concerning the plaintiff below, and of and concerning the said prosecution, which had been so depending as aforesaid, and of and concerning the evi

ALBANY,  
January, 1816.

CHAPMAN  
V.  
SMITH.

[ \* 79 ]

ALBANY,  
January, 1816.

CHAPMAN  
V.  
SMITH.

dence by the plaintiff below given, on the said trial, as such witness as aforesaid, and on a point material in and to the prosecution, these false, scandalous, malicious, and defamatory words, that is to say: "You (meaning the said *Elkanah*) have sworn to a damned lie, and I (meaning the said *Titus*) can prove it."

The other three counts are substantially the same.

The jurisdiction of the justices is supposed to be destroyed by the allegation, that they were constituted to hear and determine a cause between the people of the state of *New-York*, on the complaint of *Ebenezer Carterline*, jun., and *Titus Chapman*, defendant: if they had not jurisdiction, then it is conceded that the false swearing would not be perjury, and the words would not be actionable. The averments that the Court was legally constituted, agreeably to the act concerning apprentices and servants, that the plaintiff was examined before that Court on oath, and that they had full power and complete authority to administer the same, fully show a jurisdiction in the justices. By reference to the act under, and agreeably to, which it is averred the Court of three justices was legally constituted, it will appear, that they had power and authority only to decide concerning the misuse of an apprentice, or servant, by his \*master or mistress, or of misbehavior of the apprentice towards his master or mistress: this act confers no authority upon three justices to try any matter wherein the people of the state are concerned.

[ \* 80 ]

After verdict, we are, I think, warranted in rejecting, as surplusage, the false title of the suit. The three justices were convened under the act stated, and it was a plain misconception, that the people of the state were concerned; but that misconception did not deprive them of jurisdiction. It was the very gist of the inquiry in the Court below, as we must intend, whether the three justices had power or not to administer an oath to the plaintiff below; it having been averred, in the declaration, that the Court was legally constituted, and that they had full power, and complete authority, to administer the oath, the plaintiff below could not have recovered a verdict without showing it. It is a rule of the common law, that surplusage will not vitiate, after verdict; *utile per inutile non vitiatur*; and, therefore, where, in *trover*, the plaintiff declared that, on the third of *March*, he was possessed of goods which came to the defendant's hands, and that, afterwards, to wit, on the first of *March*, he converted them to his own use, it was held to be cured after verdict. (2 *Tidd's Pr.* 827, and the cases referred to.)

The case has frequently occurred in this Court, that justices of the peace, in making returns to *certioraris*, have stated that the cause was tried under the repealed act of 1808; and we have uniformly held, that a mistake of the act did not affect their jurisdiction. This can be considered in no other light than a mis

entitling of proceedings, before magistrates authorized by statute to act. Suppose these magistrates had discharged the apprentice from his indentures, could it be contended that they were trespassers, on the ground of a defect of jurisdiction, merely because they erroneously supposed the people of the state were parties to the proceeding? I should suppose not.

In several cases, we have decided, that charging a person with swearing falsely before a justice, without a *colloquium*, showing that it referred to a trial, or other legal occasion, was not actionable. (1 *Johns. Rep.* 505. 8 *Johns. Rep.* 109. 2 *Johns. Rep.* 10.) But in *M'Claghry v. Wetmore*, (6 *Johns. Rep.* 82.) we say, that to charge a person with taking a false oath in a Court, has been held actionable. In that case, it was averred, that the plaintiff was duly sworn, and was testifying to \*a point material between the parties; and, of course, that averment fortified and strengthened the particular case; but it is manifest, from the opinion of the Court, that the judgment would not have been arrested, had that averment not been contained in the declaration; we expressly said, that, after verdict, we must conclude that the malice was proved, and that if, under any circumstances, such words are actionable, the suit is to be sustained.

In the present case, there is an averment, that the words were spoken of and concerning the evidence given by the plaintiff below, and on a point material in and to the prosecution; but if this averment had not been made, I should still be of the opinion that, after verdict, we must intend that the words were spoken in relation to material evidence. In *Pangburn v. Ramsay*, (11 *Johns. Rep.* 142.) it was decided, that where there is a defect, imperfection, or omission, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts, defectively or imperfectly stated, or omitted, and without which it is not to be presumed the judge would direct, or the jury would have given, the verdict, such defect, omission, or imperfection, is cured by the verdict. On the trial, it would have been competent to either party, to inquire in reference to what part of the evidence given, the words were spoken; and if it had appeared that they were spoken of evidence entirely immaterial, it is not to be presumed that the plaintiff below would have obtained a verdict. The verdict, therefore, shows, that it must have been proved that the words were spoken of material testimony. This principle, in my apprehension, applies, with equal force, to both objections; for the plaintiff could not have succeeded in the Court below, without showing that the justices had power to administer the oath to him.

ALBANY.  
January, 1816.

CHAPMAN  
V.  
SMITH.

[\*81]

Judgment affirmed.

ALBANY,  
January, 1816.

THE PEOPLE  
v.  
HERRICK.

\*THE PEOPLE *against* HERRICK.

A witness, either on the *voir dire*, or on cross examination, is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. (a)

AT the Court of General Sessions of the Peace, for the county of *Washington*, *Herrick* was brought to trial for grand larceny.

The charge in the indictment was for stealing the property of *Roswell Granger*, consisting of pillow-cases, shirts, tablecloths, handkerchiefs, &c. The evidence against the prisoner was, that one pillow-case and one handkerchief were found in his possession. The prisoner then offered to prove, by *Samuel Hardy*, that he (*Hardy*) was present, and saw the prisoner purchase the pillow-case and handkerchief, in his possession, of one *Washburn*, and pay for them, and that *Washburn* had absconded. *Hardy*, the witness, being called to the stand, was asked by the public prosecutor, "whether he," *Hardy*, "had not been convicted of petit larceny, and whether he was not then in confinement under that conviction." The counsel for the prisoner objected to the question, insisting that the witness was not bound to answer it; but the Court overruled the objection; and the witness answering the question in the affirmative, he was set aside, as incompetent. The prisoner was, thereupon, convicted; but the Court, at the request of his counsel, delayed giving judgment until the advice of this Court could be obtained, whether the witness, *Herrick*, was bound to answer the question put to him by the public prosecutor, or not.

SPENCER, J., delivered the opinion of the Court. If the witness was not bound to answer the question, he ought not to have been compelled to do so; and being excluded, and the defendant deprived of the benefit of his testimony, the conviction was illegal.

† *Peake*. 129,  
130.

Mr. *Peake*,† in his treatise on evidence, in considering whether a witness is bound to answer a question, either rendering him infamous, or disgracing him, says that a practice of putting such questions, and requiring them to be answered, had continued for a long time without objection, but that some of the judges had lately thought, that neither convenience nor authority justify this mode of examination; and he admits that the highest and most enlightened characters in the profession are \*much divided on this point, and that the question was then undetermined.

[ \* 83 ]

In *Priddle's* case, (*Leach's Crown Law*, 382, old edition,) he was examined before Mr. Justice *Buller*, when called as a witness, and was asked, as it would appear, without objection, whether he had not been convicted of a conspiracy, and sen-

(a) Vide *The People v. Mather*, 4 *Wendell's Rep.* 229. *Southard v. Rexford*, 6 *Coven*, 234.



tenced to be imprisoned in *Newgate* for two years, and on his answering in the affirmative, he was rejected. In *The King v. Edwards*, (4 *Term Rep.* 440.) on an application to bail the prisoner, one of the bail was asked, whether he had not stood in the pillory for perjury; the question was objected to, as tending to criminate him; the Court overruled the objection, saying there was no impropriety in the question, as the answer could not subject him to any punishment.

ALBANY,  
January, 1816.

THE PEOPLE  
v.  
HERRICK

There are no other cases, in the *English* courts, which I have been able to meet with, affirming the right to examine a witness on *voir dire*, as to his own turpitude or criminality. I mean questions, the answers to which directly implicate the witness in a crime. There is no pretence for saying, that it ever was decided that a witness is obliged to answer questions which would subject him to punishments, pains, penalties, or infamy. The ground of the decision, in *The King v. Edwards*, is, that, the witness having been convicted and punished, he did not, by answering the question, subject himself to any punishment; and the same observation is applicable to *Priddle's* case.

There are many authorities which go strongly to uphold the contrary doctrine, that a witness is not bound to answer questions which prove that he has been convicted of the *crimen falsi*. In *Cooke's* case, (4 *State Trials*, 748. *Salk.* 153.) Ch. J. *Treby* said, and the other judges concurred, "Men have been asked, whether they have been convicted and pardoned for felony, or whether they have been whipped for petit larceny, but they have not been obliged to answer; for, though their answer in the affirmative will not make them criminal, nor subject them to punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer." It is laid down as an axiom, by almost all the writers on evidence, that the party who would take advantage of the exception, that a witness has been convicted of the *crimen falsi*, must have a copy of the record of conviction ready to produce in Court. (*Buller's N. P.* 292. *Gillb. Law of Ev.* \*old edit. 102. *Comyn's Dig. Testmoigne*, (A. 5.) 1 *Hawk. tit. Ev.* ch. 46. s. 104, and the cases there cited.)

[ \* 84 ]

Since the observations in *Peake's* text, the case of *The King v. The Inhabitants of Castell Careinion*, (8 *East*, 77.) has occurred; and there Lord *Ellenborough*, with the concurrence of all the judges, decided, that a witness could not be called on to testify that he had been convicted of larceny, and punished. His lordship says, "Whether or not the witness were convicted of felony, would appear by the record; and it cannot be seriously argued that a record can be proved by the admission of any witness. He may have mistaken what passed in Court; this can only be known by the record, and there is no authority for admitting parol evidence of it."

It may be said, that a witness may be introduced unexpectedly, and that a party may be surprised so far as not to have the

ALBANY,  
January, 1816.  
NORTHROP  
v.  
MINTURN.

record of conviction ready to produce. This is very probable but other things are to be considered than the convenience or interest of parties. It is against a fundamental principle, that a party shall accuse himself, and propagate, to the remotest period, his own infamy. The declaration of the party is not the best evidence of which the case is susceptible; and it may be the fact, that the party himself mistakes the nature of his offence; for we perceive that *conspiracy*, and even *barratry*, will exclude a person from testifying; the infamy of the crime, and not the nature of the punishment, working the incapacity.

But the hardship of excluding such questions is imaginary. If the witness has been convicted of an infamous crime, his character is lost; and it is not to be supposed there are not witnesses, within the reach of the party, to prove the character of the witness. If the offence has been committed long before, and the witness, by his good conduct, has regained his standing in society, then it affords no regret that the party objecting to his competency has not the record of his conviction. On authority, and the fitness of the rule, we are of opinion, that the proceedings in the Court below are erroneous, on the ground that the witness *Hardy* was excluded from testifying.

[ \* 85 ]

\*NORTHROP *against* MINTURN.

A note given for the use of a billiard table, is not illegal, unless it appear that the person to whom the note was given kept a tavern. (1 N. R. L. 178, 179.) (a)

† 1 R. S. 661.

ERROR, on a *certiorari* to a justice's Court.

*Minturn* brought a suit against *Northrop*, on a promissory note given by *Northrop* to *Minturn*, for 25 dollars. The defence was, that the note was given for a gaming debt. In support of the plea, the defendant below produced a witness, who swore, "that, at the time when the note was given, *Minturn* admitted that 8 dollars of the note was for a ball-bill, and the residue for the use of a *billiard table*; but that he knew nothing of *Northrop's* gaming."

There was a verdict and judgment for the plaintiff below, for the whole amount of the note.

*Per Curiam.* Supposing the true construction of the evidence to be, that part of the consideration of the note was for the use of a billiard table in *playing billiards at the house of Minturn*; yet, as there is no evidence that *Minturn* then kept a tavern, it was not an unlawful contract; there being no evidence that it was for money lost at play.

The judgment below must be affirmed.

(a) *People v. Sergeant*, 8 Cowen, 139.

THE PEOPLE *against* THE JUDGES, &c. OF THE GENERAL SESSIONS OF THE PEACE OF THE COUNTY OF GENESEE.

ALBANY,  
January, 1816.

THE PEOPLE  
v.  
JUDGES, &c. of  
GENESEE.

ON the 14th of *May* last, at the Court of General Sessions of the Peace, of *Genesee* county, *Henry Markham* was indicted for an assault and battery, and having pleaded not guilty, and the trial being brought on by the attorney of the district, *Markham's* counsel objected to the trial proceeding, on the ground that a private suit had been brought against him in the Court of Common Pleas, to recover damages for the same assault and battery, which suit was still pending and undetermined. On this ground \*the Court below refused to allow the trial of the indictment to proceed, and the attorney of the people now applied for a *mandamus*, to be directed to the Court of General Sessions, commanding them to proceed in the trial of the cause.

On an indictment for an assault and battery, the trial will not be stayed because a civil suit is pending, to recover damages for the same assault and battery; though, it seems, [ \* 86 ] judgment, after conviction, may be stayed, until the decision of the civil suit

*Per Curiam.* This is an application for a *mandamus* to the Court of General Sessions of the county of *Genesee*, to compel them to proceed to the trial of *Henry Markham*, upon an indictment for an assault and battery. The affidavit of the district attorney states, that the Court refused to proceed to the trial of *Markham*, solely on the ground that a private suit had been commenced, and was then pending against him, by the prosecutor. This was not a sufficient reason for postponing the trial of the indictment. It might be good cause for suspending judgment, if the defendant should be found guilty, in order, in some measure, to regulate the discretion of the Court in imposing the punishment. We think, however, that the application for a *mandamus* ought not to be granted at this time. The indictment was found at the same term in which the public prosecutor moved to bring on the trial. The delay, therefore, has not, as yet, been unreasonable. The Court of General Sessions, from what is stated by the district attorney, were, probably, misled by what is said in *Espinasse's Digest*, (1 *Esp.* part 2. 184.†) that it is the practice in *New-York*, in such cases, to stay the criminal suit until a decision in the private action. We are not aware of any such practice, nor do we think it warranted, if any thing more is intended than a stay of judgment after conviction. The rules and principles which govern the granting of informations, are not applicable, to the trial of indictments. Should the Court, hereafter, postpone the trial of the indictment, solely on the ground of the pendency of the private suit, it might become necessary and proper for this Court to interfere by *mandamus*. But, under the circumstances attending the case, as now presented to us, we think the application ought to be denied.

† *Goul. l's* edit  
2 *Burr* 913

Motion denied

ALBANY,  
January 1816.

CRAWFORD

v.  
MILLSPAUGH

If the holder of a note, after the time of payment, and after a suit has been commenced against the endorser, release the maker by writing, not under seal, and without consideration; such release is void, and is no defence in the action against the endorser. (a)

\*CRAWFORD *against* MILLSPAUGH.

THIS was an action of *assumpsit*, brought by the plaintiff, as second endorsee, against the defendant, as second endorser of a promissory note drawn by *Charles Lindsey*, for 700 dollars, payable to one *Jackson*, or order. The cause was tried at the *Orange* circuit, in *September*, 1815, before his honor the chief justice.

The defendant pleaded *puis darrein continuance*, that the plaintiff released *Lindsey*, the maker of the note, and in support of the plea produced, on the trial, the following writing: "It being represented to me that *Charles Lindsey* is insolvent, I do hereby release him from a certain note of 700 dollars, drawn by him, and endorsed by *Joseph H. Jackson* and *Peter A. Mills- paugh*, of which note I am the holder, not, however, relinquishing my right to recover from any, or all of the endorsers, upon said note. Dated *September 23d*, 1814. *A. Crawford*."

A verdict was taken for the plaintiff, for the amount of the note, with interest, subject to the opinion of the Court. The case was submitted without argument.

*Per Curiam.* It is evident, from the facts in this case, that the writing set up by the defendant, was made and executed some time after the note had become due; indeed, after the commencement of this action, and, consequently, at a period when the defendant was liable for the amount as endorser; so that, if this note, in the hands of the plaintiff, as endorsee, could even be considered, or treated, as a parol agreement, it appears that the promise, on the part of the endorser, was broken, and could not be discharged by a new agreement, without satisfaction, unless it be by deed. The writing upon which this defence is grounded, is not under seal, and is without consideration; it must be deemed a mere *nudum pactum*. (*Harrison v. Close*, 2 *Johns. Rep.* 450.) It is, therefore, unnecessary to advert to the conditions showing the intention of the party, as stated in the writing itself, to decide whether it could be controlled by such condition, admitting it to be sufficient in other respects, \*because enough appears, from the facts in the case, to show that it cannot affect the right of the plaintiff to recover.

[ \* 88 ]

Judgment must be entered for the plaintiff.

(a) Vide *Chandler v. Herrick*, 19 *Johns. Rep.* 123. *Jackson v. Stackhouse*, 1 *Cow* en, 122.

HAYWOOD *against* SHELDON.ALBANY,  
January, 1816.

HAYWOOD

v.

SHELDON.

IN ERROR, from the Court of Common Pleas of the county of *Columbia*. The defendant in error brought an action of debt in the Court below, for 50 dollars, had and received by the plaintiff in error, to his use, whereby an action had accrued to him, to have and demand the said sum, "according to the form, and as is provided in the second and third sections of an act of the state of *New-York*, entitled an act to prevent excessive and deceitful gaming." At the trial, the counsel for the plaintiff below offered to prove, that the plaintiff and defendant had bet 50 dollars, respectively, on the event of a certain horse-race, and that the bet having been decided in favor of the defendant, the stakeholder paid over the plaintiff's money to the winner. The defendant's counsel moved for a nonsuit, on the ground, that the plaintiff had declared under the act to prevent gaming, but that his evidence related to an offence within the act to prevent horse-racing; but the Court denied the motion. The defendant then offered to prove, that the plaintiff, in making the bet, acted as the agent of other persons, and had himself bet but ten dollars of the fifty. The Court rejected the evidence, and the jury found a verdict for the plaintiff.

A bill of exceptions was tendered to the Court below, and a writ of error brought to this Court.

*Van Buren*, for the plaintiff in error.

*E. Williams*, contra.

*YATES, J.*, delivered the opinion of the Court.

By the 5th section of the act, entitled an act to prevent horse-racing, and for other purposes therein mentioned, (1 *N. R. L. 222*.) (c) all contracts for money, or other thing, bet, or staked, on a horse-race, are declared void; and the person who may have paid any money, or any other thing, is authorized to recover the amount so paid upon the issue, or event, of such race, in like manner as is provided in the 2d and 3d sections of the act, entitled an act to prevent excessive and deceitful gaming, (1 *N. R. L. 152*.) (d) which second section of the last-mentioned act authorizes the loser at any game, if the sum lost is of, or above, a specific amount, to sue for, and recover the money so lost, or paid, in an action of debt; and that, in such action, it shall be sufficient for the plaintiff to allege, in his declaration, that the defendant is indebted to the plaintiff in the

An action to recover back a wager laid on the event of a horse-race, is to be brought in the form prescribed by the act to prevent excessive and deceitful gaming; and if the plaintiff, in his declaration, state that the action had accrued to him according to the form, and as is prescribed by the second and third section of the act to prevent excessive and deceitful gaming, he will, nevertheless, be permitted to show a cause of action arising under the act to prevent horse-racing. (a)

The action is properly brought by the person who made the bet, although he acted as the agent or depository of other persons. (b)

[ \* 89 ]

(a) Vide *Swall v. Allen*, 6 *Wendell's Rep.* 335. *M'Keon v. Caherty*, 3 *Ibid.* 494. *Allen v. Ehle*, 7 *Coven's Rep.* 496.

(b) Vide 11 *Johns. Rep.* 23. 12 *Johns. Rep.* 1. *Zielly v. Warren*, 17 *Johns. Rep.* 192.

(c) 1 *R. S.* 662

(d) 1 *R. S.* 662, 3.

ALBANY,  
January, 1816.

HAYWOOD  
v.  
SHELDON.

moneys so lost and paid, for so much money had and received by such defendant, to the plaintiff's use, without setting forth the special matter.

The declaration, in this case, is in the general form prescribed in the second section of the last-mentioned act, which is the correct and only manner of proceeding to authorize a recovery. It is true, that it also states the demand to be according to the form, and as is provided in the second and third sections of the act entitled an act to prevent excessive and deceitful gaming, which, if it has any meaning, shows the action to be founded on the statutes; and it might, perhaps, as well have been omitted; but I can discover no reason why this addition should prevent the Court below from receiving evidence applicable to the fifth section of the act to prevent horse-racing. That section expressly declares, that a recovery, in the cases therein stated, of which the present is one, shall be had in like manner as is provided in the second and third sections of the above act, to prevent excessive and deceitful gaming. The form of declaring is the same, in cases occurring under the sections referred to, in both the statutes. The defendant could not be surprised, or misled by it; nor can it be deemed a misrecital. The Court below, therefore, correctly allowed the sections from both statutes to be read in evidence, and received parol testimony as applicable to the issue joined by the pleadings in the cause.

The proof offered by the defendant, that the plaintiff, in making the bet, had acted as the agent and depositary of other persons, and that he had himself only bet 10 of the 50 dollars, was properly overruled by the Court. It could be of no importance, \*on the trial of this issue, what number of persons had intrusted the plaintiff with the money, and were thus interested in the bet. That was an arrangement exclusively between the plaintiff and them, in which the defendant had no right to interfere, and to which he was no party. He thought proper to make the contract with the plaintiff as principal, and not as agent. It is to him alone that he is responsible. The statute, in authorizing the recovery of the money lost, evidently intended that it should be by the person in whose name the bet had been made. He only can be deemed the loser, and, consequently, is alone entitled to the benefit of the recovery; and this, from the nature of the transaction, is the only correct rule by which the right to the amount lost can, in the first instance, be tested. The persons having an interest in the money, if such a claim, or right, exists at all, must have it under a different and distinct contract with the plaintiff, and may, afterwards, seek their remedy from him. The evidence was properly overruled, and the plaintiff is entitled to judgment on the verdict in the Court below.

Judgment for the plaintiff.

THE PEOPLE *against* HOLBROOK.

THE defendant was indicted, at the General Sessions of the Peace of Oneida county, for stealing bank notes. The indictment stated, "for that (the defendant), with force and arms, &c., at, &c., four promissory notes, commonly called bank notes, given for the sum of fifty dollars each, by the *Mechanics' Bank*, in the city of *New-York*, which were then and there due and unpaid, of the value of 200 dollars, and four other promissory notes, given by the same bank, for twenty dollars each, which were then and there due and unpaid, of the value of eighty dollars, the *goods and chattels* of *Peleg Clark*, then and there being found, feloniously did steal, take and carry away," &c.

\*Other larcenies of bank notes were also charged, in another count in the indictment, which it is unnecessary to state.

The defendant was tried, and convicted, on the indictment. A bill of exceptions was taken, at the trial, to the opinion of the Court, overruling an objection to, and admitting, parol evidence of the contents of the notes, without producing the notes, or accounting for their non-production in any way.

The district attorney moving to bring on the argument, on the bill of exceptions, the Court intimated a decided opinion that a bill of exceptions would not lie in a criminal case. (a) It was then agreed, between the counsel for the defendant and the attorney of the people, that the questions arising should be discussed as on a case made for the opinion of the Court.

*Storrs*, for the defendant, contended, 1. That the indictment was defective in not setting forth the notes more at large, with proper averments of the authority of the bank to issue such notes; so that it might appear that these were valid and existing securities. This objection, he said, applied to both counts. The act of the legislature, authorizing this corporation to issue notes, gives authority to issue them only in a particular manner; and it does not appear, from the indictment, that the notes in question were issued according to the statute. It is necessary that the thing charged to be stolen should be of some value.†

2. The indictment does not state the notes to be the *property* of any person; it merely says, being the *goods and chattels* of *P. C.* In *Rex v. Sadi and Morris*,‡ the Court in *England* held that the word "chattels" might be rejected as surplusage, if the indictment was sufficient in other respects; and, in that case, the words used were "*property and chattels*" of *S. Bank*

ALBANY,  
January, 1816.

THE PEOPLE  
v.

HOLBROOK.

On the trial of an indictment for stealing a bank bill, note, &c., under the statute, (1 N. R. L. 174, sess. 24. ch. 88.) parol evidence of the contents of the bills or notes stolen, is admissible, without accounting for their non-production. (b)

Where the in-

[ \* 91 ]

dictment stated that the defendant stole "four promissory notes, commonly called bank notes, given for the sum of 50 dollars each, by the *Mechanics' Bank*, in the city of *New-York*, which were due and unpaid, of the value of 200 dollars, the goods and chattels of *P. C.*, then and there found," &c., it was held a sufficient description, without saying they were the property of *P. C.* The word *chattels* denotes property and ownership.

It seems, that a bill of exceptions will not lie in a criminal case. (c)

† *Phipoe's* case, 2 *Leach's Crown Law*, 774. 2 *East's Crown Law*, 599.

‡ 2 *East's Crown Law*, 601, 603.

(a) See *M'Nally's Ev.* 325—329.

(b) *Harding v. Kretzinger*, 17 *Johns. R.* 293.

(c) *Ex parte Vermilyea*, 6 *Cowen*, 555.

ALBANY,  
January, 1816.

THE PEOPLE  
v.

HOLBROOK.

† *Handy v.*  
*11 bb n.* 12  
*Joins. Rep.* 220.  
*S. P. Holmes v.*  
*Newcastle, ib.*  
395.

[ \* 92 ]

‡ *6 St. Tr.* 58.  
229. 1 *M. Nal-*  
*ty's Ev.* 348.  
561. 353. 355. 1  
*Leach's Crown*  
*Lau. Rex v.*  
*Attkles,* 330.  
332. 335. 336. n.

§ 2 *East's*  
*Crown Law,*  
502.

¶ 2 *Hawk. P.*  
*C.* 333. s. 74.  
*Ibid.* 322. s. 59.

¶ 12 *Johns.*  
*Rep.* 220. 395.

notes are mere "*choses in action*." Should it be said that this Court have decided that bank notes may be taken in execution, as goods and chattels,† yet it does not follow that they are to be so considered in *criminal* cases. If they were so, it was idle to pass the statute.

3. The notes or securities ought to have been produced; or it should have been shown that they were in the possession of the defendant, and could not be produced, before parol evidence \*was admitted of their contents. The rule on this subject is the same in criminal as in civil cases.‡

*Kirkland*, contra, contended, that the notes were sufficiently described; they are stated to have been made by the *Mechanics' Bank*, of the city of *New-York*, and signed by the president and cashier, and the sums are mentioned. In *Milne's* case,§ it was held, that an indictment, stating that the defendant stole "a promissory note for one guinea," was good. All that is required, in such case, is, that there should be convenient certainty in the description.||

The act, under which the defendant was indicted, (1 *N. R. L.* 174. sess. 24. ch. 88.) (a) declares, that if any person shall steal any bill of exchange, &c., or other public security, &c., for the payment of money, &c., being the property of any other person, &c., notwithstanding any of the said particulars are, or may be, termed in law a *chose in action*, it shall be deemed a felony, of the same nature and same degree as it would have been if the offender had stolen "any other goods of the like value," &c. It is clear, from the language of the act, that these bills, notes, &c., are to be treated precisely as goods or chattels, in this respect. Besides, this Court has expressly recognized the doctrine, that bank notes are goods and chattels, by allowing them to be taken in execution.||

Parol evidence, in this case, was admissible, for, from the nature of the case, the thing stolen is stated to be in the possession or power of the defendant; and it cannot be necessary to give him notice to produce it. It is not in the power of the prosecutor to produce it, and, if the defendant does not, parol evidence of its contents is admissible.

*Per Curiam.* We are of opinion, that parol evidence of the contents and amount of the notes, charged to have been stolen, was properly received, without accounting for their non-production. It has been repeatedly decided in the Courts of Common Pleas, and King's Bench, in *England*, that, in an action of *trover* for bond and notes, no notice to produce the thing sought to be recovered was necessary. (1 *Camp. N. P. Cas.* 143. 3 *B. & P.* 143.) Lord *Ellenborough*, in *How v. Hall*, (14 *East*, 274.) put the decision on this strong and irrefragable ground, that where the form of the action gives the defendant notice to



\*be prepared to produce the instrument, if necessary, to falsify the plaintiff's evidence, it is not necessary to give the defendant notice to produce the instrument. This reasoning applies with equal force to an indictment for stealing an instrument; it supposes it to be in the hands of the defendant, and he is apprized, by the indictment, to produce it, if necessary, to falsify the proof against him. And Lord *Ellenborough* mentions a case before Justice *Buller*, where parol evidence of the contents of a note was permitted, without notice, upon an indictment.

We think the notes sufficiently set forth: being in the hands of the defendant, it was impracticable to state them *in hæc verba*, and the analogy between *trover* and an indictment for instruments, again arises; a general description is all that is required in *trover*. *Milne's case* (2 *East's Crown Law*, 602.) warrants this indictment. He was indicted for stealing a promissory note for the payment of one guinea, and, also, one other promissory note for the payment of five guineas; after conviction, a question was reserved for the opinion of the judges, whether the notes were sufficiently described in the indictment; and all the judges held the indictment well laid, and the conviction proper. It is true that *Craven's case*, (2 *East*, 601.) where the question again arose, was determined differently by all the judges; but we think the former decision more reasonable and sound.

The remaining question is, whether the notes were well described as the goods and chattels of *Peleg Clark*. The statute (1 *R. L.* 174.) (a) enacts, "that if any person shall steal, &c., any bill of exchange, bond, order, warrant, bill, or promissory note, for payment of any money, &c., being the property of any other person, &c., it shall be deemed and construed to be felony, of the same nature, and in the same degree, and in the same manner, as it would have been if the offender had stolen, &c., any other goods of the like value with the money due on such bill. &c., or secured thereby and remaining unsatisfied, and such offender shall suffer such punishment as he, or she, ought to have done, if such offender had stolen, &c., other goods of the like value as aforesaid."

In the case of *Sadi v. Morris*, (2 *East's Crown Law*, 749.) it was held, by a majority of the judges, to be improper to lay bank notes to be chattels; and the statute of 2 *Geo. II.* c. 25. is like our statute. The dissentient judges thought that, the statute \*having made it felony to steal bank notes, in like manner as if the party had stolen goods of the like value, the receivers of such property stood in the like predicament as the receivers of other goods and chattels; and *East* considers the opinion in *Sadi* and *Morris's* case as shaken, by the resolution of all the judges in *Dean's* case, and other cases, wherein bank notes, by the operation of the statute of 2 *Geo. II.*, were holden

ALBANY,  
January, 1816.

THE PEOPLE  
v.  
HOLBROOK.

[ \* 94 ]

ALBANY,  
January, 1816.

JENNINGS  
v.  
CAMP.

to be within the statute of *Anne*, against stealing money, goods, &c.

*Blackstone* (2 *Com.* 285.) says, "that things personal, by our law, not only include things movable, but also something more; the whole of which is comprehended under the general name of *chattels*, which, Sir *Edward Coke* says, is a *French* word, signifying goods. "In the *grand coutumier of Normandy*, (he observes,) a *chattel* is described as a mere movable, but, at the same time, is set in opposition to a *fief* or *feud*, so that not only goods, but whatever was not a *feud*, were accounted *chattels*; and it is in this latter, more extended negative sense, that our law adopts it; the idea of goods, or movables only, being not sufficiently comprehensive to take in every thing that the law considers as a *chattel* interest."

We are of the opinion that, since the statute, it is sufficient to lay in an indictment that the notes or instruments, mentioned in the statute, are the goods and *chattels* of any person who is entitled to them; and that the word *chattels* denotes and signifies, when applied as in this case, property and ownership; and that, consequently, the conviction is right.

### JENNINGS *against* CAMP.

Where a party enters into a special contract, and, having performed part of it, without the

[\* 95] consent or default of the other party, voluntarily abandons the further performance of it, he cannot maintain an action on the implied *assumpsit*, for the labor actually performed.

Where the special contract is still in force, the plaintiff cannot resort to the general counts.

(a) Where a contract is entire, a full performance

IN ERROR, from the Court of Common Pleas of the county of *Madison*.

The plaintiff's declaration was in *assumpsit*, and contained two counts. The first count stated an agreement between the plaintiff and defendant, in the Court below, dated the 1st of *July*, 1812, by which *Camp*, the plaintiff below, and defendant in error, agreed to log up, burn, and clear, fit for sowing, ten acres of land on a certain lot belonging to the defendant below, the plaintiff in error, in a good, farmerlike manner, by the 20th of *September*, and to fence the said ten acres with a good rail fence, by the first of *October* next; and the defendant below agreed to pay the plaintiff at the rate of eight dollars per acre, part to be paid in oxen, &c., and then averred performance.

The second count was a general *indebitatus assumpsit*, for work and labor. The defendant pleaded the general issue, and the jury found a special verdict, viz. "That the plaintiff, in pursuance of the contract and agreement mentioned in the first count, did partly clear the land in that count mentioned, but

is a condition precedent to the plaintiff's right of action. (b)

(a) Vide *Miller v. Watson*, 4 *Wendell's Rep.* 267. *Wright v. Butler*, 6 *Ibid.* 154.  
(b) *Stephens v. Beard*, 4 *Wendell's Rep.* 606. *Lantry v. Parks*, 8 *Cow. Rep.* 63. *Reab v. Moon*, 13 *Johns. Rep.* 337. *Jewell v. Schroepfel*, 4 *Cow. Rep.* 564. *Thorpe v. White*, *supra*, 53. *Hoar v. Clute*, 15 *Johns. Rep.* 224. *Rafelye v. Mackie*, 6 *Cowen*, 250. *Webb v. Duckingfield*, *infra*, 390.

made none of the fence ; and then, of his own accord, default, and negligence, and without any fault, default, or consent of the defendant, abandoned and gave up all further proceedings towards fulfilling the said contract, and hath not yet finished or fulfilled what he undertook to perform by the said contract ; and whether, under these circumstances, it is competent and lawful for the plaintiff to put an end to the said contract in the said first count mentioned, and proceed on a general count for work and labor, and to recover the value of what he did, in pursuance of said contract, the jury are uninformed, and pray the advice of the Court," &c. ; and they assessed the plaintiff's damages, on the second count of the declaration, at fifty dollars. The Court below gave judgment for the plaintiff, and the cause was submitted to this Court without argument.

ALBANY,  
January, 1816  
JENNINGS  
v.  
CAMP.

SPENCER, J., delivered the opinion of the Court.

This case does not present the question, whether, on a failure to prove the special contract, in consequence of a variance between the declaration and the proof, the plaintiff may not resort to the general count ; but the point is, whether a party who enters into a contract, and performs part of it, and then, without cause, or the agreement or fault of the other party, but of his own mere volition, abandons the performance, can maintain an action, on an implied assumpsit, for the labor actually performed ; and it seems to me, that the mere statement of the case shows the illegality and injustice of the claim.

\*There are two principles, which are considered well established, precluding the plaintiff below from recovering : first, the contract is open between the parties, and still in force ; the defendant below has done no act to dissolve or rescind it ; and it was decided, in *Raymond and others v. Bernard*, (12 Johns. Rep. 274.) upon a review of all the cases, that, if the special agreement was still in force, the plaintiff could not resort to the general counts. 2d. The contract being entire, performance, by the plaintiff below, was a condition precedent, and he was bound to show a full and substantial performance of his part of the contract ; this was so decided in *M. Millan v. Vanderlip*, (12 Johns. Rep. 166.) In *Cutter v. Powell*, (6 Term Rep. 320.) a sailor, hired for a voyage, took a promissory note from his employer, for thirty guineas, provided he proceeded, continued, and did his duty, as second mate, from *Kingston* to *Liverpool*. Before the arrival of the ship, he died ; and the Court held, that wages could not be recovered, either on the contract, or on a *quantum meruit*. The decision was founded on common-law principles. Lord *Kenyon* said, that where the parties have come to an express contract, none can be implied, has prevailed so long as to be reduced to an axiom in the law. *Ashhurst*, J., very pertinently observed, this is a written contract, and speaks for itself ; and as it is entire, and as the defendant's promise depends on a condition precedent, to be per-

[ \* 96 ]

ALBANY,  
January, 1816.

JACKSON  
V.  
ROSEVELT.

formed by the other party, the condition must be performed before the other party is entitled to receive any thing under it; that the plaintiff had no right to desert the agreement, and recover on a *quantum meruit*; for, wherever there is an express contract, the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage.

The case of *Faxon v. Mansfield & Holbrook*, (2 Mass. Rep. 147.) is directly in point. *Mansfield* agreed with *Holbrook* to erect and finish a barn, by a fixed day, when he was to receive 400 dollars, in full compensation: he performed part of the work, and left it unfinished, without the consent, and contrary to the wishes of *Holbrook*. *Parsons*, Ch. J., in giving the opinion of the Court, said, on these facts, *Mansfield* could maintain no action, either on his contract, or on a *quantum meruit*, against *Holbrook*; his failure arising not from inevitable accident, but his own neglect.

[ \* 97 ]

\*In *Whiting v. Sullivan*, (7 Mass. Rep. 109.) *Parsons*, Ch. J., said, "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration."

In *Livingdale v. Livingston*, (10 Johns. Rep. 36.) we recognized a position, in *Buller's Nisi Prius*, "that, if there be a special agreement, and the work be done, but not in pursuance of it, the plaintiff may recover upon a *quantum meruit*: for, otherwise, he would not be able to recover at all." This observation has misled the Court below. Correctly understood, it has no application here. It supposes a performance of the contract, with variations from the agreement, probably with the assent of both parties, or it may mean an extension of the time within which the agreement was to be performed, with the like assent. The position never was intended to embrace the case of a wilful dereliction of the contract, when partly executed, by one of the parties, without the assent, and against the will of the other.

Judgment reversed.

---

JACKSON, *ex dem.* CARMAN and others, against ROSEVELT.

Where an heir, sued on the bond of his ancestor, pleads *non est factum*, and the issue is found against him, this is not such a false plea as will render him liable *de bonis propriis*. (a)

A sale, under an execution, to a *bona fide* purchaser, cannot be defeated for error or irregularity in the judgment, or execution, or on the ground that no levy was made until after the return day. A sheriff's deed to a purchaser under an execution, describing the premises sold no otherwise than as "all the lands and tenements of the defendants, situate, lying, and being in the *Hardenburgh* patent," is void for uncertainty. (b)

(a) *Van Deusen v. Brower*, 6 Cow. Rep. 50.

(b) *Jackson v. Jones*, 9 Cow. Rep. 182. *Jackson v. Young*, 5 Cow. Rep. 269. *Jackson v. Delancey*, in *fra.*, 537.

in the great lot No. 2, in the *Hardenburgh* patent, situate in the town of *Liberty*, in the county of *Sullivan*, and in which the parties agreed on a case for the decision of the Court.

On the 20th of *April*, 1708, letters patent were issued to the seven proprietors of the *Hardenburgh* patent, among whom was *Leonard Lewis*, from whom the lessors of the plaintiff ultimately derived their title. On the sixth of *September*, 1729, the patentees conveyed to *James Graham* one equal undivided eighth part of the tract; and, in 1730, *Leonard Lewis*, having previously, by will, dated the 20th *February*, 1723, devised his interest in the patent to his wife, *Elizabeth*, during her widowhood, and, \*at the termination thereof, to his eleven children, as tenants in common, in fee, of whom *Joapsie*, the wife of *Laurence Van Kleeck*, was one. On the 31st of *January*, 1733, *Gerardus Lewis*, another of the children and devisees of *Leonard Lewis*, conveyed his interest in the patent to *Laurence Van Kleeck*. In 1749, a partition was made between the proprietors of the patent, by which great lots No. 2, 17, 20, 28, and 36, fell to the representatives of *Leonard Lewis*, between whom a subdivision of the part which they held in common, was shortly thereafter made, and lot No. 20, in great lot No. 2, was allotted to *Joapsie*, the wife of *Laurence Van Kleeck*.

*Joapsie Van Kleeck* died intestate, about the year 1758, seised of the lot No. 20, and leaving five children; viz. *Baltus*, her eldest son, and heir at law, *Leonard*, *Sarah*, the wife of *Jacobus Van Kleeck*, *Elizabeth*, then married to *Jacobus Van Bummel*, since the widow of *Henry Ellis*, and *Tryntie*. Soon afterwards, *Laurence Van Kleeck* died seised of the share in the patent, or some part thereof, purchased as aforesaid from *Gerardus Lewis*, having devised all his estate to his five children. On the 9th of *January*, 1767, *Baltus Van Kleeck* conveyed to each of the other children of *Joapsie Van Kleeck*, one fifth part of the share which their mother had possessed in the patent. *Baltus Van Kleeck* died in 1786, leaving the lessors of the plaintiff his heirs at law.

In *April* term, 1789, an action of debt was commenced against *Elizabeth Ellis* and *Jacobus Van Kleeck*, and *Sarah*, his wife, (the said *Elizabeth* and *Sarah* being the heirs and devisees of *Laurence Van Kleeck*,) at the suit of *Thomas Marston* and *John Marston*, executors of *Nathaniel Marston*, on a bond, executed by *Laurence Van Kleeck*, in the penalty of one thousand pounds, conditioned for the payment of five hundred pounds. The defendants pleaded *non est factum*, on which a verdict was found against them, and judgment entered the 5th of *March*, 1790. The judgment was in the ordinary form of a judgment against defendants sued in their own right, and has never been reversed, annulled, or set aside. Executions were issued, by which part of the amount of the judgment was levied, and, finally, a *test. fi. fa.* was issued to the sheriff of the county of *Ulster*, reciting the former executions, and describing the

ALBANY,  
January, 1816.

JACKSON  
V.  
ROSEVELT.

[ \* 98

ALBANY,  
January, 1816.

JACKSON  
v.

ROSEVENT.

[ \* 99 ]

defendants as "heirs and devisees of *Laurence Van Kleeck*, deceased;" but no further notice was taken of their representative character, and the levy \*was not restricted to be made *de bonis testatoris*, but of the goods and chattels of the defendants, and of the lands of which they were seised on the day of the entry of judgment.

By virtue of this execution, the sheriff of *Ulster* levied upon all the lands and tenements of *Elizabeth* and *Sarah*, the heirs and devisees of the said *Laurence Van Kleeck*, and conveyed the same to *John C. Wynkoop*, by deeds of lease and release, dated the 14th and 15th *February*, 1792. The deed of release recited, that the sheriff had exposed to sale "all the lands and tenements of the said *Elizabeth* and *Sarah*, heirs and devisees of the said *Laurence Van Kleeck*, situate, lying, and being in the patent commonly called, or known, by the name of the *Hardenburgh* or *Great Patent*, in the county of *Ulster*;" and the premises conveyed were described as follows: "All the said lands and tenements of *Elizabeth* and *Sarah*, the heirs and devisees of the said *Laurence Van Kleeck*, deceased, with the rights, members, and appurtenances thereof, situate, lying, and being in the said patent, in the county of *Ulster*, with the hereditaments and appurtenances," &c.

On the 14th *March*, 1793, *Wynkoop* commenced proceedings for a partition, under the act of *March* 16th, 1785, of the land thus purchased by him. In *April*, 1794, the commissioners filed their partition in the clerk's office of *Ulster* county, and set apart lot No. 20, in the subdivision of great lot No. 2, to defray the expense of the partition. This lot was, accordingly, sold and conveyed by two of the commissioners, under which sale, through sundry mesne conveyances, the defendant derived his title to the part of the lot which he possessed.

*P. Ruggles*, for the plaintiff, contended, 1. That *John C. Wynkoop*, on the 14th of *March*, 1793, when he commenced his proceedings in partition, had no right or title in lot No. 20, in great lot No. 2, and that the proceedings were, therefore, void; and that the lessors of the plaintiff, after the death of *Baltus Van Kleeck*, in 1786, being seised of the one fifth of lot No. 20, in the subdivision of great lot No. 2, as his heirs at law, must be entitled to recover.

The proceedings of *Thomas Marston*, and others, against *Elizabeth* and *Sarah*, the sisters of *Baltus*, were against them as heirs and devisees of *Laurence Van Kleeck*, when, in fact, they were purchasers under *Baltus*, and claimed no title to the premises \*by descent or otherwise. These proceedings being against them as heirs and devisees, their own proper estate could not be taken.† The act under which the partition was made, was that of the 16th *March*, 1785, (sess. 8. ch. 39. 1 *Greenleaf's* edit. Stat. 165.) (a)

(a) 3 R. S. 61. App.

† 1 *Greenleaf's* edit. Stat. 408, 409. sess. 10. ch. 56. s. 6, 7. See also 1 *Greenleaf's* ed. Stat. 236, 237. sess. 9. ch. 27. 408. ch. 56. s. 6.

The plea of *non est factum*, of the ancestor, is not a false plea; and if it were found false, it would not vary the judgment; but the lands only which *descended* would be liable to execution.† Here was a pretended levy and sale of lands to which the heirs of *Baltus Van Kleeck* had no right, and the proceedings under the partition could not give any right. If the deed can have any operation and effect, it must be on the property devised by *Laurence Van Kleeck* to his five children.

Again; the deed from the sheriff is void, as being too general and indefinite to pass any estate to the grantee. It does not appear to be intended to convey the premises in question. In all sales by sheriffs or other officers, under execution, the property must be ascertained by clear and definite description or bounds.‡

Again; the execution issued more than a year and a day after the judgment, without its being revived; and the sale was long after the return day of the execution; and it does not appear that any levy was made before the return day.§

*Griffin*, contra, contended, that *Wynkoop* had a title to support the proceedings in partition. If heirs and devisees plead falsely, and knowingly, judgment goes against them personally.|| The judgment might be general, though the lands only affected by it would be liable to be sold.¶ The generality of the judgment, at most, was an error to be taken advantage of by the defendants. It did not render the judgment void. The defendants having acquiesced, and never brought a writ of error, the judgment is conclusive, and third persons, or strangers, cannot allege error.†† Though the judgment were erroneous, and should be afterwards set aside or reversed, yet the title of an intermediate *bona fide* purchaser, at a sheriff's sale, cannot be prejudiced.‡‡ So, an error in the execution will not vitiate the title of a *bona fide* purchaser at a sheriff's sale.§§ Nor can the generality of the description, in the sheriff's deed, be objected by a stranger; and it being an undivided right, it could not well be described more \*particularly, without setting out the whole bounds of the great *Hardenburgh* patent.

The act (sess. 8. ch. 39. s. 4. 1 *Greenleaf's* edit. *L. N. Y.* 165.) (a) declares, that the commissioners' "deed to the purchaser shall pass as good a title, for the separate enjoyment of the same, as if all the patentees or proprietors of the land had made and executed the same, in due form of law." The 7th section provides, that any mistakes in drawing the lots, by those having no title, &c., shall not defeat the partition or title. Purchasers at a public sale, by the commissioner under this act, stand on the same ground with purchasers at a sheriff's sale, and ought to be equally protected.

*YATES, J.*, delivered the opinion of the Court.

ALBANY,  
January, 1816.

JACKSON  
v.  
ROSEVELT  
† 2 *Saund.* 7.  
n. 4 *Cro. Car.*  
436. 2 *Tidd's*  
*Pr.* 355.

† 2 *Johns.*  
*Cases.* 384. 2  
*Johns. Rep.* 248.  
11 *Johns. Rep.*  
365. 373.

§ 4 *Johns*  
*Rep.* 450.

|| 3 *Bac. Abr.*  
463. *Heir.* (H.)

¶ 6 *Johns.*  
*Rep.* 59. *Jackson*  
*v. Hoag.*

†† 2 *Bac. Abr.*  
*Error.* (B.)

‡‡ *Manning's*  
*case.* 8 *Co.* 191.  
§§ *Jackson v.*  
*Bartlett.* 8  
*Johns. Rep.* 361.

[ \* 101 ]

ALBANY,  
January, 1816.

JACKSON  
v.  
ROSEVELT.

The first question in this cause is, as to the validity of the general judgment entered in the suit instituted by the executors of *Nathaniel Marston*, against *Elizabeth Ellis* and *Jacobus Van Kleeck*, and *Sarah*, his wife, as heirs and devisees of *Laurence Van Kleeck*, under which the defendant claims his title, derived from the purchaser at a sheriff's sale, in virtue of an execution issued on that judgment.

The rule recognized in the books is, that, when the heir pleads a false plea, the plaintiff is entitled to a general judgment, but that *non est factum* of the ancestor is not deemed such a plea, if even it be found, on the trial, that the ancestor had executed the deed. In 2 *Saund.* 7. n. 4., it is expressly laid down, that the plea of *non est factum* of the ancestor is an exception to the above rule; that, if it be found false, it does not alter the judgment, but the lands descended only are liable to execution. The case of *Clothworthy v. Clothworthy*, (*Cro. Car.* 437.) supports the same principle.

It is manifest, then, that the judgment on which the premises were sold to *John C. Wynkoop*, by the sheriff of *Ulster* county, is erroneous, and might have been corrected, on proper application for the purpose. It certainly cannot be deemed void altogether, particularly as against a purchaser at a sheriff's sale, because it is the judgment of a Court of general jurisdiction, and the time of entering it was known to the defendant. It might, at their instance, have been modified or set aside, previous to the sale; but, that not having been done, it remained in force, and was in operation at the time of sale; and the title to lands under it, in the hands of an innocent and *bona fide* purchaser, \*ought to be protected by it, unless such sale is rendered questionable on other and different grounds.

The objections, that it took place long after the return day of the execution, and that it did not appear that a levy had been made before the return day, and that the execution had not been issued until more than a year and a day after judgment, cannot affect the sale. In *Jackson, ex dem. M<sup>c</sup>Creagh, v. Bartlett*, (8 *Johns. Rep.* 361.) this Court decided, that, in an action of ejectment against a purchaser under a sheriff's sale, the regularity of the execution could not be questioned, and that, if an execution issues after a year and a day, without a revival of the judgment by *sci. fa.*, it is only voidable at the instance of the party against whom it issued. In this case, I can see no reason why the same doctrine should not apply to the irregularity of the judgment, as well as the execution. A contrary principle would be attended with manifest injustice to purchasers. The defendant in the suit knew, or ought to have known, the consequences which would inevitably follow their allowing the judgment to remain. Having appeared and pleaded, in the suit against them, as heirs and devisees, and a part of the debt having been collected from them by the sheriff of *Dutchess* county, in virtue of an execution on the same judg-



ment, before the sale made by the sheriff of *Ulster*, it cannot be presumed that they were not fully apprized of the operation of the judgment on all the real property owned by them. Their negligence and acquiescence, therefore, in not causing it to be set aside in season, would be conclusive against them, provided the deed executed by the sheriff of *Ulster*, to *John C. Wynkoop*, on the sale under the judgment and execution before stated, is sufficient, in law, to convey the premises in question.

The deed contains the following description: "All the lands and tenements of *Elizabeth Ellis* and *Sarah Van Kleeck*, heirs and devisees of *Laurence Van Kleeck*, situate, lying, and being in the patent commonly called and known by the name of the *Hardenburgh* patent."

This description is too general: it does not define the lots, or parts of the lots of land owned by the defendant named in the judgment; nor is the allotment in which they are situated mentioned, although, by the case, it appears that the patent had been divided among the proprietors, and that such partition was notorious, for it is stated to have been recorded in the office \*of the secretary of state, and that it had been confirmed by an act of the legislature. To say, therefore, that a sheriff's deed for all the lands and tenements of *Elizabeth Ellis* and *Sarah Van Kleeck*, in this patent, containing a tract of land evidently one of the most extensive in the state, and comprehending a district of country lying in several counties, is sufficient, would be giving an unprecedented latitude to the officer making a coercive sale, and by mere operation of law, and might be attended with consequences destructive to the rights of the debtor. No estimate of the value of the lands offered for sale could be made from this general and indefinite description; and, without some definite information as to its situation, there must generally be a sacrifice of property, either by the debtor or purchaser. In most instances, if not invariably, the former would experience the loss. The officer ought to prevent such a consequence. The least that can be required of him, in making the sale, is so to locate the lands, as to afford means to the bystanders and bidders, of informing themselves as to the value. That was not done in the present case. The deed given by the sheriff of *Ulster*, must be deemed wholly inoperative, for the want of a sufficient description of the premises alleged to have been sold by it. If so, *John C. Wynkoop*, to whom the deed was given, had no right to institute proceedings in partition under it. The commissioners, consequently, appointed by the Court, under those unauthorized proceedings, could not give a title to the purchasers, which is the source of the defendant's claim.

The 4th section of the statute for partition of lands, passed 16th of *March*, 1785, declaring that the deed of the commissioners, or any two of them, to the purchaser of lands set apart, and sold to defray the expenses of partition, shall pass to him

ALBANY,  
January, 1816  
JACKSON  
V.  
ROSEVELT

[ \* 103 ]

ALBANY,  
January, 1816.

JACKSON  
v.  
ROSEVELT.

[ \* 104 ]

as good a title for the separate enjoyment of the lands so purchased as if all the patentees or proprietors of the said land had made and executed the same, in due form of law, cannot avail in this case. It is true, the premises in question are held under a purchase, at a public sale, intended, unquestionably, to have been made by the commissioners, according to and under the act above mentioned; but, as before shown, no authority existed by which *John C. Wynkoop* could institute those proceedings, and, of course, the confirmatory clause in the act does not apply to the deed given by them. There is nothing, \*therefore, to preclude the lessors of the plaintiff, as the representatives of *Baltus Van Kleeck*, from setting up their claim to the premises in question.

*Laurence Van Kleeck* held his lands in the *Hardenburgh* patent, by deed from *Gerardus Lewis*, one of the children of *Leonard Lewis*, being one eleventh of one eighth of all the lands in the patent; and it appears, by the first partition, that great lots Nos. 2, 17, 20, 26, and 28, fell to the share of the legal representatives of *Leonard Lewis*. What lots or parts of lots, in the subsequent subdivision between those representatives, were drawn to the share of *Laurence Van Kleeck*, is not stated in the case; nor was it necessary for the purposes of this decision; that, however, must appear from the map of this subdivision, stated to have been filed in the office of the secretary of state. He devised his estate in the patent to his four children, so that each child held an equal interest in the lands which had been allotted to him, and of which he died seised.

*Joapsie*, or *Jacobsie*, the wife of *Laurence Van Kleeck*, also held one eleventh of one eighth of all the lands in the patent, in virtue of the will of her father, *Leonard Lewis*; and in the subdivision before mentioned, lot No. 20, in the subdivision of great lot No. 2, fell to her share. She died intestate, seised of that lot, leaving *Baltus Van Kleeck* her heir at law. He conveyed to each of the remaining four children one undivided fifth part of their mother's right in the patent, retaining one fifth, to which his children, who are the lessors of the plaintiff, are entitled. The premises in question are comprehended within the above lot No. 20. Judgment must, consequently, be entered for the plaintiff, for one undivided fifth part of those premises.

Judgment for the plaintiff.

AJ. BANY,  
January, 1816.

\*HALL *against* DEAN.

HALL  
v.  
DEAN.

THIS was an action of covenant. The declaration stated, that on the 30th of *March*, 1804, the defendant and his wife executed a certain deed, by which, for the consideration of 4,625 dollars, they conveyed certain premises to the plaintiff, in fee; and the defendant, among other things, covenanted, "that the said *Joseph Hall*, his heirs and assigns, should, and might, at all times thereafter, peaceably and quietly have, hold, occupy, and enjoy, the above-granted premises, and every part thereof, and the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance, of the said *Daniel S. Dean*, his heirs or assigns, or of any other person, lawfully claiming or to claim by, from, or under him, or any of them, and that free, clear, discharged, and unencumbered, from all former and other titles, charges, estates, and encumbrances, of what nature or kind soever, had, made, committed, done, or suffered, by the said *Daniel*, his heirs or assigns, or by any other person or persons whomsoever, any thing having or claiming in the premises."

Where grantor covenanted that the grantee should, peaceably and quietly, hold the premises, without any let, suit, &c., of the grantor, or of any person lawfully claiming under him, and that free from all former, encumbrances of what nature or kind soever, made by the grantor, it was held that a judgment against the grantor, outstanding at the time of executing the deed, was a breach of the covenant, and that the grantee, having satisfied the judgment, without waiting until he was evicted, was entitled to recover the amount paid from the grantor. (a)

The plaintiff then averred, that *John Murray* and *Edward Peyer*, executors of *Jacob Watson*, obtained a judgment in the Supreme Court against the defendant for 10,800 dollars debt, and 28 dollars and 55 cents damages, which was docketed, prior to the execution of the deed, on the 23d of *February*, 1804, which judgment remained and continued in full force and virtue, and was a valid existing encumbrance on the premises, until on the 5th of *May*, 1804, when the plaintiff was forced to pay, and did pay, the sum of 3,700 dollars, for, towards, and in satisfaction of, the said judgment.

To this declaration there was a general demurrer and joinder in demurrer. The cause was submitted to the Court without argument.

YATES, J., delivered the opinion of the Court.

If this had been a covenant for quiet enjoyment only, it is clear that a lawful eviction of the grantee would be necessary to authorize the action, because such a covenant goes to the possession, and not to the title; (3 *Johns. Rep.* 471. 5 *Johns. Rep.* \*130.) but, in this case, the covenant against encumbrances is coupled with it. The defendant not only covenants that the plaintiff shall peaceably and quietly occupy and enjoy the premises, but that the premises shall be free, clear, discharged, and unencumbered of, and from, all former and other titles, charges, estates, and encumbrances, of what nature or kind soever, had, made, committed, done, or suffered, by the

[ \* 106 ]

ALBANY,  
January, 1816.

JACKSON  
v.  
ALDRICH.

where, that possession was, originally, taken by the express permission of the owner of the land, accompanied with a promise to pay for improvements.

The cases which have been decided in this Court, on ejectments by mortgagees, will serve further to illustrate this principle. In *Jackson v. Longhead*, (2 Johns. Rep. 75.) where the action was by the mortgagee against the mortgagor, notice to quit was deemed necessary, because there was a privity of contract as well as of estate, and a kind of tenancy existed, but what kind is not stated. It could not have been any thing more than a tenancy at will; and, therefore, in *Jackson v. Fuller*, (4 Johns. Rep. 215.) where the action was by the mortgagee against the purchaser of the interest of the mortgagor, no notice to quit was deemed necessary; because the purchaser was a stranger to the contract between the mortgagor and mortgagee, and there was no privity of contract or estate. If this had been an action by *Garrison* himself, it would be very difficult to maintain, upon any principle heretofore settled, that he would have been bound to give notice to quit. There was, certainly, no relation of landlord and tenant created by any express agreement; and to presume such relation from the naked fact, that the defendant continued in possession, would be carrying the doctrine of presumption beyond what, in my judgment, the rules of law will warrant.

[ \* 109 ]

It may be said, that an action for use and occupation would have lain by *Garrison* against the defendant, and that this furnishes the *test*, with respect to notice to quit. This, certainly, cannot be the *test*, for it cannot be pretended that a mortgagee can maintain an action for use and occupation against a mortgagor; yet he is bound to give him notice to quit. But no action for use and occupation could have been maintained by *Garrison*. In the case of *Smith v. Stewart*, (6 Johns. Rep. 46.) it is said, by this Court, that the statute which gives this action, applies only to the case of a *demise*, and where there exists the relation of *landlord and tenant*, founded on some *agreement* creating that relation. But where, it may be asked is the evidence of any such agreement? Why presume an agreement for a lease, rather than any other contract? The mere fact of a twelve years' possession, without the payment, or even claim, of rent, would more naturally lead to the conclusion of a reconveyance by *Garrison*, or that his title had been, in some way, extinguished. It is irrational, and against the usual course of dealing between landlord and tenant, to permit such a length of time to elapse without payment or claim of rent. It is true, where there has been a lease which has expired, and, by the consent of both parties, the tenant continues in possession afterwards, the law will imply a tacit renovation of the contract, and a tenancy from year to year is created by implication. (1 Term Rep. 162.) But, in such cases, there is something from which a continuance of the lease may reason-

ably be presumed, the prior relation of landlord and tenant having been expressly shown. In the case before us, no foundation is laid for any such presumption. The utmost that could be claimed by the defendant, against *Garrison*, would be a tenancy at will; and this relationship was determined by the sale to the lessor of the plaintiff. A tenancy at will is at the will of both parties, landlord and tenant, and either may determine his will, and quit his connection with the other, whenever he pleases. This may be done, on the part of the landlord, either by express declaration, or by the exercise of any act of ownership which is inconsistent with the nature of such estate. (1 *Cruise*, 273.)

\*The observation which fell from Lord *Mansfield*, in *Timmins v. Rowleson*, (3 *Burr*, 1609.) that leases at will, in the strict legal notion of a lease at will, exist only notionally, has by some been construed into the expression of an opinion that no such estates existed at this day. This, I apprehend, is a mistaken interpretation of his lordship's meaning. The construction given by Mr. *Hargrave*, (*Co. Lit.* 55. a. n. 3.) is undoubtedly the true one: "This observation," he says, "means not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words." (1 *Johns. Rep.* 324, and cases there cited.)

I think I have shown that the case furnishes no evidence that the defendant was tenant, from year to year, to *Garrison*; and admitting him to have been a tenant at will, even as against *Garrison*, he is not entitled to notice to quit. That right is lost by the sale, by *Garrison*, to the lessor of the plaintiff; and there is no ground upon which he can be required to give any such notice. The motion for a new trial must, accordingly, be denied.

SPENCER, J., dissented. I cannot yield my assent to the opinion of the Court. The plaintiff ought either to have been nonsuited, for the want of notice to quit, or, at all events, the point should have been submitted to the jury, to decide whether, from the facts, the defendant was not in possession as a tenant to the lessor of the plaintiff. (10 *East*, 261.)

The defendant, in 1802, conveyed the premises to *H. Garrison*, who, in 1812, conveyed to *Phillips*. The defendant retained the possession from the time he so conveyed until the trial. These facts are conclusive, in my judgment, to show, that the defendant's possession was not, and could not be, adverse to *Garrison*, but that he occupied by his implied permission and consent. Could not *Garrison* recover against the defendant, for use and occupation, under the 31st section of the act concerning distresses, &c. ? (1 *R. L.* 444.) (a) I think it does not admit of doubt that he could.

Since the statute, an express as well as an implied agree-

ALBANY,  
January, 1816.  
JACKSON  
v.  
A. RICH.

[ \* 110 ]

(a) 1 *R. S.* 748.

ALBANY,  
January, 1816.

THOMPSON  
v.  
DAVIES.

[ \* 111 ]

ment, on the one side to let, and on the other to take and hold, will support an action for use and occupation. In the present case, the defendant conveys the premises to *Garrison*, and retains possession; most manifestly, it must be with *Garrison's* consent; \*and, if so, the law confers the right of demanding rent. The alienation by *Garrison* to *Phillips* did not change the relation in which the defendant stood; *Phillips* succeeded to *Garrison's* rights and situation. (1 Term R. 387. 1 Johns. Rep. 332., *Jackson v. Bryan*.)

It follows that, if *Garrison* could not maintain an ejectment without notice to quit, his grantee could not.

I shall not travel through all the cases upon the subject of notices to quit; it is now the settled law, both in the *English* Courts and in this Court, that wherever the relation of landlord and tenant exists, or whenever it can be shown that the defendant entered lawfully into possession, and by the permission of the owner, and has done no act hostile to him, he cannot be treated as a trespasser, and subjected to an action of ejectment, without notice to quit, or a demand of the possession. (13 East, 210. 9 Johns. Rep. 330. 269. 10 Johns. Rep. 335. 7 Term R. 83.)

It is unnecessary, in this case, to go further than to say the defendant was in possession with the implied consent of *Garrison*. It would not be difficult to maintain, that he was in as tenant from year to year, and was entitled to six months' notice to quit.

There is nothing unreasonable in the doctrine of notice to quit. The rights of the landlord are not in the least impaired by requiring it, whilst tenants are not to be treated as trespassers, and subjected to costs, without any fault on their part.

Motion denied.

[ \* 112 ]

\*THOMPSON against DAVIES.

A. and B. having executions against C., of which A's execution was the elder lien, and C. being indebted to D., it was agreed between A. and D., that A. should pay D. 225 dollars; that, at the sale under the executions, A. should bid off the personal property of C. to the amount of his execution, and that D. should bid off the real property of C. to the amount of B's execution, should dispose of the same, and after satisfying his own demands against C., should refund A. the said sum of 225 dollars. A. and D., at the sale, bid off the property of C. in conformity to the agreement, and D. disposed of the real estate, and, after satisfying his own demands against C., there was a sufficient surplus to repay A., and A. brought his action to recover the money: Held, that although here was a sufficient consideration to support D's promise, yet that the agreement itself was void, being contrary to public policy, as it was an agreement tending to prevent competition at a sale under execution, and thus injurious to the original debtor.

THIS was a motion in arrest of judgment. The declaration was in *assumpsit*, and contained six counts, on a special agreement.

The first count stated, that on the 11th of July, 1808, a *fi. fa.* was issued out of this Court, at the suit of the plaintiff,

A. and D., that A. should pay D. 225 dollars; that, at the sale under the executions, A. should bid off the personal property of C. to the amount of his execution, and that D. should bid off the real property of C. to the amount of B's execution, should dispose of the same, and after satisfying his own demands against C., should refund A. the said sum of 225 dollars. A. and D., at the sale, bid off the property of C. in conformity to the agreement, and D. disposed of the real estate, and, after satisfying his own demands against C., there was a sufficient surplus to repay A., and A. brought his action to recover the money: Held, that although here was a sufficient consideration to support D's promise, yet that the agreement itself was void, being contrary to public policy, as it was an agreement tending to prevent competition at a sale under execution, and thus injurious to the original debtor.

against one *Doughty*, for 765 dollars debt, and 14 dollars and 60 cents damages, to the sheriff of the county of *Dutchess*, by an endorsement on which the sheriff was directed to levy 381 dollars and 87 cents debt, with interest, and 17 dollars and 91 cents costs; and that, on the 11th of *July*, 1808, another *fi. fa.* was issued out of this Court, at the suit of the Bank of *Columbia*, against the said *Doughty*, for 994 dollars debt, and 15 dollars and 25 cents damages, to the sheriff of *Dutchess*, by an endorsement on which he was directed to levy 447 dollars debt, with interest, and 18 dollars and 56 cents costs, which last-mentioned writ was younger than that in favor of the plaintiff, as to its lien, both on the real and personal property of *Doughty*; by virtue of these writs, the sheriff levied upon all the personal property of *Doughty*, and, also, upon a certain farm, and exposed the same to public sale; that, before the time of the sale, the defendant, as one of the firm of *William Davies & Co.*, and the plaintiff, had endorsed a certain note for *Doughty*, at the Bank of *Columbia*, for the sum of 100 dollars, which note was paid and satisfied to the bank, by a note of the same amount drawn by the plaintiff and given to the bank; that, at that time, the defendant had divers large demands against *Doughty*, amounting to a large sum, to wit, the sum of 1,000 dollars, or upwards, and the personal property not being sufficient to satisfy the plaintiff's execution, and, on the 28th of *September*, 1808, the real and personal property of *Doughty* being offered for sale by the sheriff, it was thereupon agreed between the plaintiff and defendant, as follows: the plaintiff agreed that he would bid, at the sale, for the personal property, to the amount due on the *fi. fa.*, in his favor, and would permit the real property to be bid off by the defendant, under the *fi. fa.*, in favor of the Bank of *Columbia*, and that he would pay to the defendant \*the sum of 225 dollars, part of the sum of 500 dollars above mentioned; in consideration of which promises, the defendant agreed to pay to the plaintiff the sum of 500 dollars, or that he would take up and discharge the note for that sum, given by the plaintiff to the Bank of *Columbia*; and that he would bid off the real estate under the execution of the Bank of *Columbia*, to the amount due on the same, and would dispose of the same to the best advantage, and, after satisfying himself out of the proceeds, should, out of the residue, repay to the plaintiff the said sum of 225 dollars. And the plaintiff averred that, in pursuance of the agreement, he did, on the 28th of *September*, pay to the defendant the said sum of 225 dollars, by giving him his note, payable on demand, with interest, which note has since been paid; and did, on the sale, bid up the personal property to the amount of, and in satisfaction of his execution; and that, at the sale, the defendant bid off the real estate under the execution of the Bank of *Columbia*, and the same was conveyed to him by the sheriff; that, afterwards, and in, or about, the month of *February*, 1809, the de-

ALBANY,  
January, 1816.

THOMPSON  
v.  
DAVIES.

[ \* 113 ]

ALBANY,  
January, 1816.

THOMPSON  
V.  
DAVIES.

defendant sold the real estate for a large sum of money, to wit, the sum of 3,000 dollars, or upwards; and the plaintiff averred, that all the demands of the defendant against *Doughty* did not amount to the sum which the defendant so received, by a large sum, to wit, the sum of 1,500 dollars, being a surplus more than sufficient to pay the plaintiff the said sum of 225 dollars; by means whereof, &c.

The second count stated the issuing of the two executions before the 28th of *September*, 1808, and that the execution of the Bank of *Columbia* was for the benefit of the defendant, and was younger than that in favor of the plaintiff, as to its lien, both on the real and personal estate of *Doughty*; that the sheriff had levied upon the personal and real property of *Doughty*, and offered them for sale on that day; and that, at and before the time of the sale, the defendant had divers demands against *Doughty*, amounting, in the whole, to a large sum, to wit, the sum of 1,000 dollars, or upwards; and the defendant wishing to purchase the real estate free of the plaintiff's execution, in order to secure the execution of the Bank of *Columbia*, and the other demands of the defendant, and the personal property not being of sufficient value to satisfy the plaintiff's execution, it was agreed that the plaintiff should bid off the personal property at an amount equal to that due on his execution, in satisfaction \*and discharge of the same; and that the defendant would bid off the real estate on the execution of the Bank of *Columbia*, and for the amount due thereon; and that the defendant would sell the real estate, and if he should obtain for the same enough, over and above satisfying all his demands against the said *Doughty*, he would pay to the plaintiff the sum of 225 dollars, which had been, before that time, paid to the defendant by the plaintiff, on account of the said *Doughty*; that, at the sale, the plaintiff bid off the personal property to an amount sufficient to discharge his execution, and the defendant did thereupon purchase the real estate, under the execution of the Bank of *Columbia*, which was conveyed to him by the sheriff; that, afterwards, in, or about, the month of *February*, 1809, the defendant sold and disposed of the real estate to one *Barton*, for which he received, in property or money, a large sum, to wit, the sum of 3,000 dollars, or upwards, and that the sum greatly exceeded the amount of all the defendant's demands against *Doughty*, by the sum of 1,500 dollars, being more than sufficient to pay the plaintiff the sum of 225 dollars aforesaid; by means whereof, &c.

The other four counts were substantially the same as the second; and the usual money counts were added.

*P. Ruggles*, in support of the motion, cited 3 *Johns. Cas.* 29. 6 *Johns. Rep.* 194. 8 *Johns. Rep.* 444. *Cowp. Rep.* 395. 6 *Term Rep.* 642.

*Oakley*, contra.



SPENCER, J., delivered the opinion of the Court.

This case is not distinguishable from that of *Jones v. Caswell*, (3 Johns. Cas. 29.) but by the circumstance that *Doughty* was indebted to the plaintiff beyond the sum for which he had obtained judgment and execution, and by the further circumstance that he was indebted to the defendant. The consideration for the defendant's promise was, a forbearance, on the part of the plaintiff, to bid, at the sale on the execution in favor of the Bank of *Columbia*, on the lands of *Doughty*; and, also, that the plaintiff should bid, on the sale of the personal estate of *Doughty*, to the amount of his own execution, which, it is averred, he did, and that such bid was more than the value thereof.

\*The consideration was sufficient. I agree to the position advanced by *Radcliff, J.*, in the case cited; that the foregoing some advantage or benefit, or parting with a right which might otherwise be exerted, is a valid consideration. The plaintiff, here, not only agreed to forbear bidding, but, having the prior *lien*, both on the personal and real estate, he waived it, on the latter, to his disadvantage, by bidding more, on the personal property, than its value; so that here was an actual loss to the plaintiff.

Whatever may have been the motives of the parties, in making the agreement, and however upright their intentions, the question recurs, Is not the promise made by the defendant void, as contravening established principles of public policy? If the consideration be ever so meritorious, yet, if the act agreed to be done, and which forms the basis of the agreement, be unlawful, the promise cannot be enforced in a Court of law.

The judges who delivered opinions in the case of *Jones v. Caswell* held, that the law had regulated sales on executions with a jealous care, and had provided a course of proceeding likely to promote a fair competition, and that a combination to prevent a competition was contrary to public policy, and the interests of the original debtor, whose property was liable to be sacrificed by such combinations. The same principle was recognized in *Doolin v. Ward*, (6 Johns. Rep. 194.) and in *Wilbur v. How*, (8 Johns. Rep. 444.) These were cases of sales at auction; but the principle applies with equal, nay, with more, force to sales on execution.

It has been urged that the plaintiff was not bound to bid on the second execution, and was, therefore, at liberty to enter into this agreement. That is not the test of the principle. In none of the cases cited was the party bound to bid; but, being at liberty to bid, he suffered himself to be bought off, in a way which might prevent a fair competition. The abstaining from bidding, upon concert, and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one; but there must be no combination among persons competent to bid, si

ALBANY,  
January, 1816.

THOMPSON  
V.  
DAVIES.

[ \* 115 ]

ALBANY,  
January, 1816.

JACKSON  
v.  
CREAL.  
[\* 116]

lencing such bidders, for the tendency to sacrifice the debtor's property is inevitable.

The principle is of too salutary a nature to permit any refinements which go to sap or subvert it; and, in *England*, the \*judges have, uniformly, held a strict hand over every attempt at fraud or circumvention at auctions. (*Cowp.* 395. 6 *Term Rep.* 642.)

The Court is, therefore, of opinion that the judgment must be arrested.

Judgment arrested.

JACKSON, *ex dem.* FISHER, against CREAL and KELLOGG.

Where a person entered into, and improved, land, by the permission of a tenant in common of the land, and a partition was afterwards made in 1793, it was held that the person to whose share the land in question had fallen, could not maintain an action of ejectment for it, without tendering to the tenant the value of the improvements, both before, and for all the time since, the partition, after deducting for the use and occupation of the land.

A person who has entered by the permission of one tenant in common, cannot, a partition having been made, set up an adverse title, in bar of an action of ejectment, by the tenant in common, to whose share the premises had fallen (a)

THIS was an action of ejectment, for part of lot No. 2, in the seventeenth allotment of the *Kayaderoseras* patent. In a partition of the patent, lot No. 2 fell to the share of the lessors of the plaintiff, *Daniel Campbell* and *John Beekman*, who were seised thereof, as tenants in common, until the year 1793, when a partition was made, and that part of the lot No. 2, which included the premises in question, fell to the share of the lessor of the plaintiff.

Previous to the above-mentioned partition, in 1786, *Daniel Campbell* gave one *Gilbert Weed* an instrument in writing in the following words: "Whereas Mr. *Gilbert Weed* has signed an agreement and obligation for 200 acres of land, where he is now improving, in the general lot No. 2, in the 17th allotment, I am willing he should settle on said land, and I promise to abide by said agreement. As witness my hand at *Schenectady*, the 31st day of July, 1786. *Daniel Campbell.*" *Weed*, having before improved part of the land, entered by virtue of the said writing, and it was through him, by various mesne assignments of his right and possession, that the defendants derived their claim. The defendants never paid any rent. At the time *Weed* sold his possession, there was some rent due, which he paid to *Campbell*, but the premises in question not falling to the share of *Campbell*, in the partition, he returned the money to *Weed*, according to an agreement between them, by which *Campbell* was not to give a lease to *Weed* of the premises, if, on the partition, they should not fall to the share of *Campbell*.

The case was submitted without argument, and such judgment and rules to be entered as the Court should think proper.

(a) But though a tenant in common enter without claiming adversely to his co-tenant, his possession may afterwards become adverse by some notorious act or claim of title. *Jackson v. Brink*, 5 *Coven*, 483. And see *Jackson v. Whitbeck*, 6 *Id.* 632. *Clapp v. Bromagham*, 9 *Id.* 130.

\*YATES, J., delivered the opinion of the Court.

The 6th section of the act for the partition of lands, passed the 16th of *March*, 1785, (1 *Greenleaf's* edit. *L. N. Y.* 165.) (a) states, that in case, on the partition of any patent or tracts of land on which improvements have, theretofore, been made, by any owner or proprietor, or by any person or persons, by consent of any owner or owners, proprietor or proprietors of any such patents or tracts of land, the person or persons to whose share such parcels of improved land shall fall, upon partition of such patents or tracts of land, shall, before he or they be permitted to the possession of the same, pay the respective possessor or possessors thereof the value of the improvements made thereon; and the manner of settling and ascertaining the value of such improvements by the commissioners for partition, at the instance of the proprietor, is specially pointed out; and the value being ascertained, as stated in the act, and the amount tendered to the possessor, the proprietor shall be entitled to the possession, to be delivered to him in virtue of a precept to be issued by the commissioners. On the 10th of *February*, 1790, (b) an act passed amending this law, by which the above sixth section is extended to improvements made after the passing of the first-mentioned act; and by a subsequent statute, passed the 3d of *April*, 1792, (2 *Greenleaf's* edit. *L. N. Y.* 442.) (c) the last-mentioned act is further amended, and a judge of the Court of Common Pleas is vested with the same powers, before given to the commissioners, as to ascertaining the value of the improvements; and the judge and jury are authorized and required, in every case, to ascertain and value the use and occupation of the premises so held, used, and occupied, and to deduct the amount of such valuation from the amount of the valued improvements.

The subdivision of lot No. 2, in which the premises in question are situated, took place in 1793, under the statutes above mentioned, when the premises fell to the share of the lessor of the plaintiff.

From the facts disclosed by the case, it is manifest that the purchaser under *Gilbert Weed*, according to the intent and meaning of the above statutes, and as claimed by the defendants, are entitled to compensation for the whole of their improvements, and were authorized to retain possession until such compensation, after deducting for use and occupation, had been tendered to them. They cannot, therefore, be now deprived of the possession, \*without receiving remuneration, according to the rule prescribed, because it was the duty of the lessor of the plaintiff to have caused the valuation to have been made, and to have paid the amount. Having neglected to do so, and having allowed the subsequent improvements to be made, he ought not to be exonerated from paying the value of such as

ALBANY,  
January, 1816.

JACKSON  
V.  
CREAL

[ \* 118 ]

(a) 3 R. S. 61. App.

(b) 3 R. S. 71. App.

(c) 3 R. S. 71. App.

ALBANY,  
January, 1816.

JACKSON  
v.  
ELLIS.

have been made, both before and since the partition of 1792, subject to the deduction before stated. This neglect, while it thus protects the defendants, cannot bar the recovery of the lessor altogether, notwithstanding the possession of twenty years since the partition; because *Weed*, under whom the defendants hold this possession, having originally entered under *Daniel Campbell*, a co-tenant with the lessor, it cannot be deemed adverse. Judgment must, therefore, be entered for the plaintiff, with stay of execution, until the defendants shall have been paid and satisfied for the value of all the improvements, after deducting the amount for the use and occupation:

Judgment for the plaintiff, accordingly.

---

JACKSON, *ex dem.* YOUNG and others, *against* ELLIS and WHITE.

An entry under claim and color of title is sufficient to constitute an adverse possession, and it is not necessary that it should be a legal and valid title. (a)

A., claiming title to land by descent, made a parol gift of the same to B., un-

[ \* 119 ]  
der which B. entered, and, afterwards, A. conveyed the land to B.; it was held that if the deed related back to the entry of B., there was an adverse possession commencing in B.; and if it did not, still, as B., by virtue of the parol gift, became the tenant at will of A., and his possession was to be deemed the possession of A., there was an adverse possession commencing in A.

THIS was an action of ejectment, brought to recover part of lot No. 1, in the patent granted to *Frederick Young* and others, in the town of *Cherry Valley*, in *Otsego* county. The cause was tried before Mr. J. *Spencer*, at the *Otsego* circuit.

Both parties claimed under *Theobald Young*, who, on the 13th June, 1771, granted the premises in question to *Frederick Young*; under this conveyance, and as representatives of *Frederick Young*, it appeared that the plaintiff's lessors sought to recover. It was proved that, about twenty-five years before the trial, *John D. Young*, son of *Theobald Young*, claimed the premises in question as his own, and gave, by parol, part of it, being 100 \*acres, to his sister *Caty*, the wife of *Jacob Garlock*. *Garlock* and wife went into possession one or two years after, and lived on the lot until about twelve years ago, when they sold and conveyed it to one *Walradt*, since dead, to whom the defendant *Ellis* was tenant. The conveyance from *Garlock* to *Walradt* was dated the 7th of *March*, 1800, and on the 11th of *March*, 1800, *John D. Young* and wife conveyed the same premises to *Garlock*.

Evidence was given of the attainder of the ancestors of the plaintiff's lessors, for adhering to the enemies of the state during the revolution; but which it is unnecessary to state, as the decision of the Court turned altogether on the question of adverse possession.

(a) Vide *Jackson v. French*, 3 *Wendell's Rep.* 337. *Jackson v. Millar*, 6 *Cow. Rep.* 751. *Jackson v. Wheat*, 18 *Johns. Rep.* 40. *Jackson v. Newton*, *Id.* 355. *Jackson v. Woodruff*, 1 *Cowen*, 276. *Jackson v. Camp*, *Id.* 605. *Jackson v. Frost*, 5 *Id.* 346. *Jackson v. Brink*, 5 *Id.* 483. *La Frombois v. Jackson*, 8 *Cowen*, 589. *Clapp v. Bromagham*, 9 *Cowen*, 530.

A verdict was found for the plaintiff, subject to the opinion of the Court, on a case to be made, with liberty to either party to turn it into a special verdict.

ALBANY,  
January, 1816.

JACKSON  
v.  
ELLIS.

The case was argued by *Seely*, for the plaintiff, and *Morse*, (*Cady* same side,) for the defendants.

The points raised for the consideration of the Court, by the defendants' counsel, were:

1. That there had been an adverse possession for above 20 years.

2. That *F. and A. Young* were convicted under the act of attainder of 1779; and that these convictions (the judgments on which were signed in *April, 1783*) were valid, notwithstanding the preliminary treaty of peace of *November 30, 1782*.

3. That all the lessors, on whose demises the plaintiff claims, as well as those under whom the lessors claimed title, are *aliens*; and, under this point, two propositions were laid down; *first*, That all persons, wheresoever born, who were not within the jurisdiction of the *United States* at the declaration of independence, are *aliens*, excepting such persons as were absent from necessity, or with intention of returning; *second*, That all persons who, previous to the declaration of independence, had made their election to continue subjects of the king of *Great Britain*, and did, within a reasonable time thereafter, leave the *United States*, and fly to the *British* dominions, and who have not since returned to this country, but have claimed to be *British* subjects, are, in this state, to be considered *aliens*.

4. Admitting that the rights of the lessors were saved by the treaties of peace between the *United States* and *Great Britain*, \*or by the principle, that the dismemberment of an empire cannot destroy a vested right, yet, inasmuch as the lessors of the plaintiff are aliens, resident in the country of our late enemy, at the commencement of this suit, in 1814, the plaintiff cannot maintain this action. (*Jackson v. Decker*, 11 *Johns. Rep.* 418.)

[ \* 120 ]

On the first point, the defendants' counsel cited 9 *Johns. Rep.* 180. *Cowper*, 207.

The second and third points were argued at great length; but as the Court have decided the cause on the first point only, it is unnecessary to state the arguments.

*Per Curiam.* In the argument of this case, several very important questions have been raised, which it becomes unnecessary, however, to notice; because, in the opinion of the Court, such an adverse possession has been shown, as to protect the defendants against this form of action. It was admitted upon the trial, that *Theobald Young*, under whom both parties claim, was seised of the premises in question. It appeared in evidence, that *John D. Young*, son of *Theobald*, and who claimed the premises as his own, by descent from his father, did, about 25 years ago, give the same to his sister *Caty*, the wife of

ALBANY,  
January, 1816.

M'ELROY  
v.  
MANCIUS.

[ \* 121 ]

*Jacob Garlock.* That one or two years afterwards, and at least 22 years since, *Garlock* and his wife went into possession under this gift. That, in the year 1800, *J. D. Young* gave *Garlock* a deed for the same, and *Garlock* sold to *Walradt*, under whom the defendants hold. It has been repeatedly ruled, in this Court, that an entry under claim and color of title, is sufficient to constitute an adverse holding. It is not necessary, for this purpose, that the title, under which such entry is made, should be a good and valid title. (2 *Caines*, 183. 9 *Johns. Rep.* 174.) Taking this to be the rule of law, there can be no doubt that the possession taken by *Garlock* was under claim and color of title. Although *Garlock* entered under a parol gift, it must be deemed to be either a possession taken in his own right, and for his own benefit, or in behalf of *J. D. Young*, who claimed the premises by descent from his father; and, in either point of view, the nature of the possession will be the same. If the deed, subsequently given by *Young* to *Garlock*, relates back to the original entry, then the adverse possession commenced in *Garlock* himself. If it does not, then *Garlock*, under the parol gift, became a tenant at will to *Young*, and his possession will be deemed the possession of *Young*. (1 *Johns. Cas.* 36.) So that, in whatever point of view the case is considered, the original possession taken by *Garlock* must be deemed adverse. The defendants are, accordingly, entitled to judgment.

Judgment for the defendants.

### M'ELROY against MANCIUS, late sheriff of Albany.

Where a plaintiff brings an action against a sheriff for the escape of a prisoner in execution, the plaintiff's election, to consider him as out of custody, is thereby determined, and he cannot resort to a remedy which would be an acknowledgment of his being in custody. (a)

THIS was an action of *debt*, for the escape of one *Amos Hubble*, a prisoner in execution, brought against the defendant, the late sheriff of the city and county of *Albany*. The cause was tried at the *Albany* circuit, in *October*, 1815.

The declaration stated the judgment and *ca. sa.*, in this Court, against *Hubble*, and that he escaped on the 11th of *March*, 1815. The defendant pleaded the general issue, with an affidavit annexed, that the escape, if any, was involuntary, and without his knowledge, and notice of special matter to be given in evidence.

Therefore, after bringing an action against the sheriff for an escape, he cannot oppose the discharge of the prisoner under the act for the relief of debtors, with respect to the imprisonment of their persons.

The sheriff cannot avail himself, as a defence, of the acts of the plaintiff, subsequent to the suit commenced, recognizing the prisoner to be still in custody; such recognition being inoperative, as the plaintiff, by suing the sheriff, has determined his election.

It seems, that the Mayor's Court of *Albany* has no jurisdiction, under the act for the relief of debtors, with respect to the imprisonment of their persons, in case of a debtor imprisoned in the county of *Albany*, under an execution out of the Supreme Court; but that the Common Pleas of *Albany* county have jurisdiction in such case.

(a) *Littlefield v. Brown*, 1 *Wendell's Rep.* 398.

The plaintiff, at the trial, having proved the case on his part, the defendant offered to prove that, after the escape of *Hubble*, he voluntarily returned to the custody of the defendant, and remained a prisoner in execution, at the suit of the plaintiff, until the 22d day of *March*, 1815; that he then was assigned and delivered to *Isaac Hemstead*, the present sheriff; that, while remaining in his custody, at the suit of the plaintiff, on the 6th of *April*, 1815, *Hubble* having applied, after due notice given to the plaintiff, for his discharge, pursuant to the act for the relief of debtors, with respect to the imprisonment of their persons, was discharged accordingly; and that the plaintiff appeared on that notice, and opposed the discharge, thereby acknowledging him to be still in custody and execution, by virtue of the *ca. sa.*; but the testimony was overruled by the judge, who declared \*that it did not form a sufficient ground of defence, and directed the jury to find a verdict for the plaintiff, which they did accordingly.

ALBANY,  
January, 1816

M'ELROY  
v.  
MARCUS

[ \* 122

The cause was submitted to the Court without argument.

*Per Curiam.* The only question is, whether the plaintiff's opposition to the discharge of *Hubble* was such a *recognition of him, as a prisoner under plaintiff's ca. sa.*, as would amount to a legal defence in this suit.

In the case of *Rawson v. Turner*, (4 *Johns. Rep.* 469.) it was decided, that if "there has been an escape, both in the time of the *former*, and of the *new* sheriff, the plaintiff has an election, either to consider the prisoner *in execution*, and so charge the new sheriff for the last escape, or as *out of execution*, and charge the old sheriff." And that "the bringing a suit against the one, or the other, is a determination of his election."

In the case of *Dash v. Van Kleeck*, (7 *Johns. Rep.* 477.) where, after an escape of a prisoner on execution, and return into custody, the sheriff went out of office, and assigned the prisoner to his successor; and while in his custody, the prisoner applied for his discharge, under the act for the relief of debtors, &c., and the plaintiff, *not knowing of the escape*, opposed the application, in consequence of which the prisoner remained in custody; it was held, that this was not such an election to affirm the debtor in custody, as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape. These cases show that the plaintiff may lose his former right of action, by resorting to another remedy.

But this case is distinguishable from those above cited, in this essential feature; viz. that the act of affirming the prisoner *in execution*, was done *after the plaintiff* (by this suit) *had made his election* to consider him *out of execution*.

A subsequent attempt to obtain another remedy, is no bar to this suit, which was rightfully commenced, and which *determined* the plaintiff's election. Here it appears that the plaintiff failed in his opposition to the discharge of the prisoner; and such

ALBANY,  
January, 1846.

WIDRIG  
v.  
OYER.  
[ \* 123 ]

failure may have been on the very ground that he had elected another remedy by suing for the escape, and, therefore, had no right to object to the discharge of the prisoner.

\*Besides, it may well be doubted whether the whole proceeding, relating to the discharge of *Hubble*, was not *oram non judice*. We incline to the opinion, that the *Mayor's Court* of the city of *Albany* is not a "*Court of common pleas*," within the fifth section of the act for the relief of debtors, &c. (1 R. L. 351.) (a) The general rule, under this act, (sect. 4.) is that each Court of record can afford the relief only to prisoners confined under its own process; but the fifth section authorizes "*the Court of Common Pleas in the county*" in which, &c., to execute this law in regard to prisoners confined upon executions issued from this Court. Such a jurisdiction cannot be vested without *express authority*; and, in this case, I think there is no just ground even to *imply* such authority; because, in the county of *Albany*, there is a "*Court of common pleas*," as in the other counties, entirely independent of the *Mayor's Court*.

The order of the *Mayor's Court* of *Albany*, for discharging, or refusing to discharge, *Hubble*, would, therefore, have been equally a nullity.

We are of opinion, that the evidence offered on the part of the defendant was properly overruled; and that the plaintiff is entitled to judgment.

(a) 2 R. S. 31.

---

### BRYAN against SEELY.

Fees of electors of grand assize.

THE COURT said, that the *electors* of the *grand assize*, on a writ of right, were entitled to the same fees for attending the Court, &c., as the sheriff, which, in *November* term, 1803, were fixed at 3 dollars *per diem*, for going to, and returning from, the Supreme Court. (b)

(b) Vide *Clapp v. Van Epps*, 3 *Wendell's Rep.* 430.

[ \* 124 ]

\*WIDRIG against OYER and wife.

To say of a woman, "She procured, or took medicine, or poison, to kill the bastard child she was like to have; and she did kill, or poison, the bastard child she was like to have," &c., is actionable. (c)

IN ERROR, from the Court of Common Pleas of *Herkimer* county. The plaintiff brought an action of *slander* in the Court

(c) *Martin v. Stilwell*, *infra*, 275. *Demarest v. Harding*, 6 *Cowen*, 76.



below. The words charged, as spoken by the wife of *Oyer*, the defendant, of and concerning the plaintiff, were, "She (meaning the plaintiff) did, with the assistance of her mother, procure, and take medicine, or poison, in order, and with intent, to kill, and poison to death, a bastard child she (the plaintiff) was pregnant with, or like to have; and she (the plaintiff) did kill the bastard child which she was like to have, by means of taking the said medicine," &c. The defendants demurred to the declaration, and the Court below gave judgment for the defendants on the demurrer.

The only question was, whether the words charged in the declaration were actionable.

*N. Williams*, for the plaintiff in error. He cited *Brooker v. Coffin*, 5 *Johns. Rep.* 188. 3 *Co. Inst.* 50. 1 *Bl. Com.* 129. *Christian's note.* 1 *Hawk. Pl. Cr.* b. 1. ch. 31. sect. 16 *Bracton*, l. 3. ch. 21. *Finch's Law*, 186. He was stopped by the Court.

*Skinner*, contra, said it was idle to go back to ancient books, when this Court had so clearly laid down the rule, as to what words were actionable, in *Brooker v. Coffin*; "That where the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, the words, in themselves, were actionable." We admit the soundness of the rule, but with a slight alteration of "or" to *and*, which would make it conformable to the cases in *Wilson*<sup>†</sup> and *Salkeld*. The charge, we contend, must not only involve moral turpitude, but, also, subject the party charged to an infamous punishment. Procuring an abortion is not, by the law of *England*, or of this state, murder, or manslaughter.<sup>‡</sup> The impossibility of proving the fact may, perhaps, be the reason why no case can be found in which such an offence has been punished in *England*.

ALBANY,  
January, 1816

WIDRIG  
v.  
OYER.

<sup>†</sup> *Onalono v. Horne*, 3 *Wils. Rep.* 177. 3 *Salk.* 128.

<sup>‡</sup> 1 *Hale, P. C.* 433. 3 *Co. Inst.* 40. *Hawk.* b. 1. ch. 81. sect. 6.

\**Per Curiam*. We have no doubt the offence charged is indictable, and its criminality, or moral turpitude, cannot be questioned. The words were clearly actionable, within the rule laid down by us in *Brooker v. Coffin*, which we consider as affording the best criterion for determining whether words spoken are actionable or not. The judgment of the Court below must be reversed.

[ \* 125 ]

Judgment reversed.

ALBANY,  
January, 1816.

BRANDIGEE

v.

HALE.

Where an action was brought by a non-resident plaintiff, and, at the trial, the plaintiff's attorney was produced as a witness for his client, and was objected to on the ground that no security had been filed for the costs, and that, therefore, he was interested, and a bond was immediately executed, and tendered to the defendant's counsel, who admitted the sufficiency of the obligors, but refused to receive it, and it was then filed with the clerk; it was held that this was a bond of which the defendant might have availed himself had a verdict gone in

[ \* 126 ]

his favor, and that the competency of the witness was restored. (a)

But if the defendant had not admitted the sufficiency of the obligors, could the judge, at the circuit, have decided upon it? *Quære.*

### BRANDIGEE against HALE.

THIS was an action of *assumpsit*, on three promissory notes, payable on demand, made by the defendant to one *Jacob Brandigee*, or order, and by him endorsed to the plaintiff, dated the 18th of *April*, 1807, for one hundred dollars each. The cause was tried at the *Otsego* circuit, in *May*, 1815, before Mr. J. *Spencer*.

*L. Elderkin*, the attorney for the plaintiff, was called as a witness on the part of the plaintiff, and objected to by the defendant's counsel, because the plaintiff being a non-resident, and no bond having been filed, in pursuance of the 14th rule of *January* term, 1799, he was, therefore, liable for costs. These facts being admitted, a bond was drawn and executed by three persons, in the penalty of two hundred dollars, with condition to pay costs to the defendant, in case a verdict should pass in his favor, or the plaintiff become nonsuit: the bond was tendered to the defendant's counsel, who admitted the obligors to be abundantly responsible, but refused to receive it. The judge then decided that the witness had done all in his power to exonerate himself from his responsibility to the defendant, and that he might be sworn as a witness for the plaintiff, upon filing the bond with the clerk, which was done. The witness proved the hand-writing of the maker and endorser. Evidence was produced, on the part of the defendant, to show that, at a settlement of accounts, which took place on the 22d of *August*, 1808, the notes in question were included, which was opposed by contradictory testimony on the part of the plaintiff; none of which, however, is it important to state. The jury being directed by the judge to find a verdict for the defendant, if they believed that the notes were included in that settlement, or, if not, then for the plaintiff, they gave a verdict for the plaintiff.

The defendant now moved for a new trial, and the case was submitted to the Court without argument.

PLATT, J., delivered the opinion of the Court. Upon the first question, as to the competency of the witness, we are of opinion that the bond for costs, so executed and filed, would have been available to the defendant, in case the verdict had been for him, or the plaintiff had become nonsuit; and as the defendant acknowledged the sufficiency of the obligors, I think the attorney was properly admitted as a witness. If the solvency of the sureties had been denied, it might have presented a question of more embarrassment. I think it very questionable, whether the judge, at the circuit, could determine upon the sufficiency of the obligors, so as to absolve the plaintiff's

(a) *Vide Chaffee v. Thomas*, 7 Cow. Rep. 358.

attorney from eventual liability for costs. Upon the second question, as to the sufficiency of the evidence, I see no just ground to disturb the verdict. The question of fact, submitted to the jury, turned, in a great degree, upon the credibility of witnesses, of which they were the most proper judges.

ALBANY.  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

Judgment for the plaintiff.

\*LYNCH *against* THE MECHANICS' BANK.

[ \* 127 ]

BRONSON *against* THE SAME.

BACON *against* THE MANHATTAN COMPANY.

BACON *against* THE CITY BANK.

THE above, and several other suits, were brought on notes issued by the banks, and which they had refused to pay in *gold or silver*, which had been demanded of them, the banks, generally, having suspended their payments *in specie*.

The suits were commenced by original writs, the *precipes* for which were filed in the office of the clerk of this Court, the 22d of *July* last, and the writs were sealed on that day, tested the 13th of *May*, being the last day of the preceding term, and made returnable the second *Tuesday* of *August*, the second common return day of the *August* term. One of the writs was as follows: "The people of the state of *New-York*, by the grace of God free and independent, to the sheriff of the city and county of *New-York*, greeting: If *Nathaniel Bacon* shall make you secure to prosecute his suit, then put by sureties and safe pledges, the president and directors of the *Manhattan Company*, that they be before our justices of our Supreme Court of judicature, on the third *Tuesday* of *August* next, at the capitol, in the city of *Albany*, to answer unto the said *Nathaniel Bacon*: For that, whereas the said president and directors of the *Manhattan Company*, on the 31st day of *October*, in the year of our Lord 1812, at the city and county of *New-York*, and at the first ward of the said city, made their certain promissory note, commonly called a bank note, bearing date the day and year aforesaid, by which said note, the said president and directors of the *Manhattan Company* promised to pay to a certain *J. Madison*, or bearer, on demand, one thousand dollars, to wit, lawful money of the *United States of America*, and then and there issued the said note; and afterwards, to wit, on the 12th

The original writ, in *assumpsit*, against a corporation, must be in the nature of a *summons*, and not by *pone* or *attachment*. And where the original is by *pone* or attachment, it cannot be amended, being conformable to the *precipe*, but may be quashed on motion.

Original writs, issuing out of this Court, pursuant to the statute of the 17th of *February*, 1815, (sess. 38. ch. 38.) must be tested like all other process issuing out of the Court, that is, in *same day* in term. (a)

(a) Vide *Gordon v. Valentine*, 16 *Johns. Rep.* 145. *Chandler v. Brecknell*, 4 *Cowen*, 49.

ALBANY,  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

[ \* 128 ]

day of *May*, in the year of our Lord 1815, at the city, county, and ward aforesaid, the said note lawfully came to the \*hands and possession of the said *Nathaniel Bacon*, who thereby became, and was, and from thenceforth hitherto hath been, and still is, the lawful holder, owner, and bearer thereof, and entitled to the payment of the sum of money therein specified, to wit, at, &c., by reason of which premises, and by force of the statute, in such case made and provided, the said president and directors of the *Manhattan Company*, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at, &c., undertook, and faithfully promised the said *Nathaniel Bacon*, well and truly to pay to him, the said *Nathaniel Bacon*, the said sum of money mentioned in the said note, according to the tenor and effect thereof, when they, the said president and directors, &c., should be thereunto requested: And the said *Nathaniel Bacon* avers, that, afterwards, to wit, on the same day and year last aforesaid, the said note was shown and presented by the said *Nathaniel Bacon*, he, then and there, being the holder, owner and bearer thereof, as aforesaid, to the said president and directors, &c., to wit, at their banking house, in the city, county and ward aforesaid, for the payment thereof, and they, then and there, had notice, that the said *Nathaniel Bacon* was, then and there, the holder, owner and bearer of the aforesaid note: And the said *Nathaniel Bacon*, then and there, required them, the said president and directors, &c., to pay to him, the said *Nathaniel Bacon*, the said note, the said sum of money mentioned therein, according to the tenor and effect thereof: (And whereas, &c., setting out various other bank notes, in like form:) Nevertheless, the said president and directors, &c., in no wise regarding their several promises and assumptions aforesaid, in form aforesaid made, but contriving, and fraudulently intending, craftily and subtilly, to deceive and defraud the said *Nathaniel Bacon*, in this behalf, did not, nor would, at the time the said several notes were shown and presented to them for payment thereof, as aforesaid, to wit, on the said 12th day of *May*, in the year 1815, or at any time afterwards, pay the said several sums of money, in the said several notes specified, or any or either of them, or any part thereof, to the said *Nathaniel Bacon*, but wholly refused and neglected so to do, and still do refuse to pay the same to him, to the damage of the said *Nathaniel Bacon* of nine thousand dollars, as he says: And have you then there the names of the pledges, and this writ. Witness, *Smith Thompson*, Esq., chief justice of the city of *New-York*, the thirteenth \*day of *May*, in the year of our Lord 1815, and of our independence the 39th.

[ \* 129 ]

"*Towt*, Attorney."

"*Fairlie*."

On the writ were the following endorsements. "Pledges to prosecute, *John Doe* and *Richard Roe*."

"I certify to the justices within named, that the president

and directors of the *Manhattan Company*, within named, are attached by twelve pieces of *Spanish* silver coin, each of which is commonly called a quarter of a dollar, of the value of twenty-five cents each. *R. Hubbard*, sheriff."

ALBANY,  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

The defendants not having appeared according to the exigency of the original writs, writs of *distringas* were taken out, returnable at the last *October* term. On the *quarto die post* of the return of the writs of *distringas*, motions were made in behalf of the defendants, who had not appeared, to quash the original writs.

These motions were argued, at great length, by the counsel of the different parties, during the two last days of the term. The points insisted on by the counsel for the defendants, were, 1. That the writ ought to have been in the nature of a *summons*, and not a *pone* or attachment, which does not, they said, lie against a *corporation*.

2. That the writ, being an *original*, ought to have been tested on the day on which it was sealed, and not by relation to the preceding term; it being the rule of common law, that original writs must be tested on the day on which the *precipe* is filed.

3. That the writ, being conformable to the *precipe*, could not be amended, there being nothing to amend by.

4. That these defects in the writs may be taken advantage of on motion.

It is not thought necessary to give the arguments of the learned counsel at large. The following is a brief summary of them, with the principal authorities cited.

*Colden*, for the defendants. The original against a *corporation* should be by *summons*, and not by *attachment*. (1 *Kyd on Corp.* 271, 272. 1 *Tidd's K. B. Pr.* 108. 116. 2 *Impey's C. B. Pr.* 675. n. 6 *Mod.* 183. *Com. Dig. Plead.*) (2 B. 2.)

Is this writ a *summons*? The sheriff has not treated it as such. He does not say, in his return, that he has summoned the defendants, \*or even put them by pledges, &c.; but that he has *attached* them by certain pieces of money. The first *process*, or proceeding by original, is a *summons*, or warning to appear, according to the exigency of the writ, which, in personal actions, is by leaving a *copy* of the writ with the defendant, or at his usual place of abode. (1 *Tidd's K. B. Pr.* 103. 3 *Bl. Com.* 279. *Finch's Law*, 305. 352.) If the defendant does not appear on the summons, before, or on the *quarto die post*, a *distringas* issues. (1 *Tidd's Pr.* 111. 114. *Prec. in Chan.* 129. 131. 3 *Hen. Bl. Rep.* 267. 279. *Appendix to Tidd's Pr.*)

[ \* 130 ]

There is not any form of a writ against a *corporation* to be found in the *Register*; but it is said, merely, that it is the same as against a *peer*.

It may be said, that when the demand is *certain*, as in *debt*,  
VOL. XIII. 15 113

ALBANY,  
January, 1816.

LYNCH

V.  
MECHANICS'  
BANK

*detinue, trover*, the writ is *precipe quod reddat*, &c., or an *optional* writ; but that, where the demand is *uncertain*, the writ is *si te fecerit securum*, &c., and an attachment thereon. This is, no doubt, the general rule, which has, however, some exceptions, one of which is the case of a *corporation*, in the suit against which, where the writ *si te fecerit securum*, &c., the command is not, *pone per vadios et salvos plegios*, &c., but to summon by good summoners, &c.

*Anciently*, by the common law, the only process to compel appearance in actions unaccompanied by force, or a breach of the peace, was by *summons* and distress infinite. The person of the defendant was never taken. In later times, as commerce increased, the *capias* was introduced. (*Sellon's Pr. Appendix*, (C.) 646. *Tidd's Pr.* 122. 3 Co. 12. 3 Bl. Com. 281.)

The course of proceeding, by *summons* and *distringas*, against a *corporation*, is founded in reason and common sense. A corporation is an artificial or political person, not a *physical* being. It cannot commit a breach of the peace. It cannot, therefore, be supposed to have committed a breach of the peace on which the process of *attachment* is founded. (5 Com. Dig. Plead. (2 B. 2.) 45. *Edw. III.* 3. a. *Bro. Corp.* 43. *Cas. Ch.* 205.)

Again; it is an established rule in *England*, in regard to *original writs*, that you are strictly to adhere to *form*. The party cannot deviate from the *form* given in the *register*; and if no form is to be found there, he must apply to the clerks in chancery; \*and if they cannot give him the form, he must apply to parliament. 2 Inst. 407. 1 Inst. 54. b.

The present writs vary from the language of the established forms found in the books, which is, if A. B. shall make you secure, &c., then put by *gages* or *safe pledges*; not as in the present case, "put by *sureties* and *safe pledges*." *Gages* are goods and chattels. *Pledges* are *sureties*, or persons of responsibility, who become answerable for the defendant's appearance, and may be *amerced*. The command should be put by *gages* or *pledges*, not by both, as in this case, by *sureties* and *safe pledges*.

*Slosson*, also, for the defendants. The books all agree that an attachment does not lie against a corporation, and that the proceeding is by *summons*, (3 Keb. 350. pl. 8. 6 Vin. Abr. 311. (B. a.) pl. 3. 1 Bac. Abr. 507. (Corp.) 1 H. Bl. 209. 1 Kyd on Corp. 272. 1 Tidd's Pr. 116. 2 Crompt. Pr. 144. 25. 61. a. 77. 94. 96. 2 Sellon, 148.) And the summons is served on the mayor or other head officer of the corporation. In all actions where the demand is certain, as account, covenant, debt, annuity, or *detinue*, the original writ is called a *precipe*; the defendant being commanded to do the thing required; and unless he did so, and if the plaintiff made the sheriff secure, *si te fecerit securum*, &c., he was commanded to *summons* him, by

good summoners, &c., to show cause why he had not done it. And being in the alternative either to do the thing commanded, or show cause to the contrary, it was called an *optional writ*. (3 Bl. Com. 274.) In *assumpsit*, *case*, *trespass*, *trover*, *ejectment*, *deceit*, *conspiracy*, or actions for wrongs, where the claims were for unliquidated damages, the writ is *peremptory*, and is called a *si te fecerit securum*, &c., or *pone*, by which the sheriff is directed to put the defendant, by gages or safe pledges, to show cause, &c. The writ of *si te fecerit securum*, is an attachment; that is, the sheriff might either take *gage* or certain goods of the defendant, or make him find sureties, or safe pledges, who might be amerced in case of his non-appearance.

In proceedings against *peers*, the form of a *summons* is given by *Crompton*; (2 *Crompt.* 137, 138.) and he states the mode of obtaining a *summons* against a corporation, the next process to which is a *distringas*. (2 *Crompt.* 145.)

\*So, in *Plowden*,† we find the proceedings on a *quare impedit*, in which the bishop of *Lincoln*, and the dean and chapter, were *summoned*, &c. (*Plowd.* 493.)

In *Fitzherbert's Nat. Brev.*, (92, 93.) we find forms of writs of *trespass on the case*, *si te fecerit securum*, &c., both of *pone* and *summons*; and he says, the form may be varied, and directs, in one case, that it be by *summons*, &c., and not by *pone per vadios*, &c. So, in *waste*, (*Id.* 55.) the process is *si te fecerit*, &c., then *summons*, and in *quod permittat*; (*Id.* 125.) *Quo jure*, (128.) The writ, in the case of a corporation, therefore, may be so varied, and the sheriff commanded to summon them.

2. The writ ought to have been *tested* on the day on which it issued, and not by relation to the preceding term; original writs being required, by the common law, to be *tested* on the day on which the *precipes* are filed. The late "act relative to writs and process,"‡ declares that "all original writs, heretofore issued out of the Court of Chancery, returnable in the Supreme Court, or Common Pleas, shall hereafter issue out of, and under the seal of the Court in which such writs may be returnable; and may be tested in the name of the chief justice, first, or senior judge, of such Court, *observing, in other respects, the forms now in use*; and, further, that the Supreme Court shall have the like power as is now given to the Court of Chancery, to devise and make writs in cases where there are none to be found." This act merely gives to this Court the power of *issuing* original writs, tested in the name of the chief justice; the forms, in all other respects, are to be observed. If we look, therefore, to the practice of the Court of Chancery, and its officers, to see the mode of making out these writs,§ it will be found that they are *tested* when the *precipes* are filed with the *curritor*, or clerk,

ALBANY,  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

[ \* 132 ]

† *Rastall*, 497.  
b. *Benlon*, 1 pl.  
293.

‡ *Sess.* 38.  
ch. 38. passed  
17th of *Febru-*  
*ary*, 1815. (a)

§ *Fleta*, lib  
2. ch. 13. a. 14,  
15.

ALBANY,  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

† 1 P. Wms.  
437. 2 Eq.  
Cas. Abr. 779.  
s. 2.

† 2 Str. 749.  
759, 760.

‡ 2 Burr. 961.  
Plowd. 491.  
Bambury, 161.

[ \* 133 ]

1 Fleta, lib. 2.  
ch. 13. 1 Harr.  
Ch. Pr. Introd.  
p. 5. Harg. Law.  
Tracts, 563. 1  
Com. Dig. A-  
batement. 2  
Burr. 960. Cro.  
Eliz. 829. 1  
Roll's Abr. 200.  
¶ 1 Show, 80.  
1 Tidd's Pr.  
661. Com. Dig.  
Amend. (Y.) 8  
Co. 156. 1 Ld.  
Raym. 564. 1  
Salk. 49. 700.  
1 Str. 157. 3  
Atk. 599. 1  
Salk. 53. 2  
Caines's Rep.  
63.

†† 3 Atk. 595.  
1 Show, 80. 2  
Stra. 749. 758.  
2 Burr. 966.

or when the writs are bespoke.† No writ can issue without a fiat; the teste is matter of record, and there can be no averment against it.† The original must be true in all respects; and if antedated, it may be quashed, on motion, for irregularity. There is a difference, in this respect, between an original and a *latitat*.§ The latter is founded in fiction, and understood to be so.||

3. The teste of the original is not form, and being conformable to the *precipe* filed in Court, it cannot be amended, for there is nothing to amend by.¶ And the defect may be taken advantage of on motion.††

\*Munro, and P. A. Jay, contra. Corporations cannot appear, except by warrant of attorney, under seal; and until they do appear, they cannot make a motion. If the writ is erroneous, the defendant should have prayed *oyer* of the writ, and pleaded in abatement, and this must be done within 4 days after appearance, or by bringing a writ of error; but as the Court will not now grant *oyer* of original writs, there is no way in which advantage can be taken of a defective original. (1 Saund. 318. a. n. (3), and the cases there cited. Doug. 227. 7 East, 318, 394. 1 Bos. & Pull. 646. 1 Chitty's Pl. 289.)

Actions are either *ex contractu*, or *ex delicto*; and the writs, which are actions, are formed according to this division. In all actions *ex contractu*, as account, covenant, debt, detinue, annuity, &c., the original is a *precipe*, or *summons*, but in actions *ex delicto*, as *trover*, *detinue*, *trespass*, *ejectment*, *trespass on the case*, *assumpsit*, &c., the proceeding is by *attachment*. (1 Chitty's Pl. 280. Comyn's Dig. Pl. (C. 12.) 1 Tidd's Pr. 36. Finch's Law, 254. 303. 305.) *Assumpsit*, being an action on the case, is *ex delicto*, and the original writ, as in all actions for torts, is the *pone* or *si te fecerit securum*, &c., (Jacob's Law Dict. by Tomlins. Voc. Original Writ. Boote's Suit at Law, 23. 25. 3 Bl. Com. 274. 1 Comyn's Dig. Action on the Case, (C. 1.) Though the original writ is not now set out in the declaration, yet the nature of it is always stated; and the declaration begins with saying the defendant was *attached*, or *summoned*, according as the original was, either a *pone*, or attachment, or a summons. (1 Chitty's Pl. 288.) In the books of entries and pleadings, we find various forms of *precipes* for declarations by original, on *promissory notes* and *bills of exchange*, which commence in the following words: "If E. P. shall make you secure, &c., then put, by sureties and safe pledges, J. B.," &c., precisely in the form and language used in the cases now before the Court. (1 Went. Pl. 273. 281. 293. 301. 317. 370. Lily's Entries, 90. 1 Modus Intrandi, 188.)

We say, then, that, in *assumpsit*, by *original*, the process is *pone*, or attachment. This is the general rule; and it lies on the defendants to show the exception. Actions have been brought against corporations for *trespass vi et armis*, or *quare*



*clausum fregit.* (*Theo. Dig.* 79. *Y. B.* 23. *Hen.* VI. 8. 2 *Edw.* III. 26.) So it seems that they may break the peace.

\*Why may not a corporation be attached, as well as an individual? The law, by constituting them political persons, and authorizing them to make promissory notes, necessarily subjects them to the same consequences as individuals, for a breach of their contracts. Attachments are either against the person or the goods. Though a corporation has no *body*, yet it may be attached by its *goods*, or property. The command of the writ, in this case, is to attach by sureties, gages and pledges. *Tidd*, who has been cited, says, "Where no *capias* lies, as against *peers*, &c., corporations, or *hundredors* on the statutes of hue and cry," &c., the original writ is the first proceeding; or where the defendant absconds, and the plaintiff intends to proceed to outlawry. All the precedents, without exception, of proceedings against *hundredors*, show the process to be attachment. (1 *Lily's Ent.* 295. 2 *Saund.* 374. notes. *Morgan's Vade Mecum*, 469. *Co. Ent.* 248. 349. 351. *Plead. Assist.* 457. 2 *Instruct. Cleri.* 265. *Hearne's Pl.* 214, 215.)

The form of a declaration, given in a *note by Sellon*, (2 *Sellon's Pr.* 148.) cannot be correct. It is against the whole current of authorities and precedents.

In the *Register (Registrum Brevium*, 94.) is the form of a writ against an abbot and his co-monks, which is a *pone* or attachment.† So, in a case in 8 *Hen.* VI. 1. pl. 2., against the mayor, bailiff, and commonalty, &c., of *I. Martin, J.*, says, the only process is by attachment and distress infinite. It is very remarkable, that, among the immense number of pleas of abatement, this objection, in regard to proceedings against a corporation, has never occurred.

In regard to peers, the writs all say, "having privilege of parliament," he is summoned, &c. This is founded on statute. (16 *Vin. Abr. Parliament*, (C.) 1 *Went. Pl.* 206. 10 *Went. Pl.* 474.) In *Lily*,‡ are precedents which show that peers were attached.

As to the *teste* of the writ, it is true, that the general rule in *England* is, that all original writs must be tested on the day they are issued. It is, also, an invariable rule of this Court, that all writs issued out of this Court must be *tested* in term. If a writ is tested in vacation, or out of *term*, it is void. (20 *Vin. Abr.* 264. *teste*, pl. 9, 10, 11. 13.) The defect, however, if the writ is erroneous, is amendable; and ought, under the peculiar circumstances of the case, to be amended. (1 *Bos. & Pull.* 342. 1 *Bl. Rep.* 462. 2 *Bl. Rep.* 918. *Coup.* 407. 841. 7 *Term Rep.* 299. 5 *Johns. \*Rep.* 163. 233.) In *Foster v. Pollington*, (*Fortesc. Rep.* 186.) though the chancellor and master of the rolls refused to order the writ to be amended because it was conformable to the *precipe*, yet the C. P. said, that the writ being returned there, the power of the chancellor over it had ceased, and that it was amendable by the writ itself,

ALBANY,  
January, 1816.

LYNCH  
v.  
MECHANICS'  
BANK.  
[ \* 134 ]

† See S. C.  
*Fitz. N. B.* 37.

‡ 1 *Lily's Entries*, 21.

[ \* 135 ]

ALBANY,  
January, 1816.

LYSCH  
V.  
MECHANICS'  
BANK.

because it was contradiction and nonsense; and they accordingly amended it, by striking out the objectionable words.

*Wells*, in reply. (*T. A. Emmet*, same side.) This is the first day that the defendants were bound to appear in Court, and they are in season to object to the process. They need not plead in abatement, but may avail themselves of the objection on *motion*. The cases cited from *Saunders*, *Douglas*, and *East*, were those in which the parties had appeared and pleaded, and so were held to have waived the irregularity. In *Fitzherbert*, *N. B.*, will be found writs of *si te fecerit securum*, &c., in which the proceeding was by *summons*, and others in which it is by *pone* or *attachment*. We contend, that the proper course against a corporation, is by *summons*. The writ said to be found in the *Register*, (*Regist. Brev.* 94.) was that against an *abbot*, or corporation sole. An *abbot* and monks form a corporation of a peculiar kind, where the abbot and his monks, though they are, as *natural persons*, dead in law, yet the abbot, as head of the religious house, has a political capacity of suing and being sued *alone*.† But let the plaintiffs show, if they can, an instance of a corporation aggregate, consisting of many persons, capable of being sued, who have been sued by *pone* or *attachment*. *Kyd* (*on Corp.* 222—225.) has examined all the cases in the *Year Books*‡ in which trespass was brought against a corporation, without any objection being made; and concludes, notwithstanding, that an action of trespass will not lie against a corporation aggregate.§

In the case in 8 *Hen. VI.* 1., the action was trespass; but it does not appear what the process was. One of the judges, to show the impropriety of joining an individual with a corporation, observes, that, in case of *amercement*, the process would be *attachment* and *distress* infinite, and against the individual, process of *outlawry*, which could not be joined. *Kyd*|| says, explicitly, that a suit against a corporation aggregate, must be by original out of *chancery*; and if the corporation do not appear, \*the process to compel appearance, must be by *distringas*, against the corporate property, and that an *attachment* will not lie against them, in their corporate capacity. If they have no lands, or goods, there is no way to make them appear either in a Court of law or equity. The extraordinary remedy, in such case, is by appeal to the house of lords. *Tidd* and *Sellon*¶ both say, that the process to compel a corporation to appear, is by *distringas*.

In 2 *Reeve's Hist. of Engl. Law*, (257. 262.) are the ancient forms of writs in *debt* and *covenant*, which are, *et si fecerit*, &c., *tunc summane*, &c.

The case of *peers* and *corporations* stands on the same reason; because you cannot proceed against them by *capias*; but must sue out an original *si te fecerit securum*, &c., *summons* and *distringas* thereon. Not a case has been shown of a proceeding

† 1 *Kyd on Corp. Introd.* 21, 22.

‡ 38 *Ed. III.* 18. 8 *Hen. VI.* 1. 9 *H. VI.* 36. 20. *Hen. VI.* 9. 4. *Hen. VII.* 13. 45. *Edw.* III 23.

§ 22 *Ass. p.* 67. *Bro. Corp.* 43.

|| 1 *Kyd on Corp.* 271, 272.

[ \* 136 ]

¶ 1 *Tidd*, 116. 2 *Sellon*, 148, 149. *Co. Lit.* 66. *Bro. Corp.* 43.

against a *peer*, by any other process. In the precedents in *Lily*, it does not appear that the defendants were *peers* of *Great Britain*. They were *Irish* or *Scotch* nobles.

As this Court has decided, in *Pierce v. Crofts*† that a note payable to *bearer* might be given in evidence under the general money count, in an action by the holder, why resort to the expensive mode of proceeding by original, in these cases?

As to the *teste* of the writ, the late act could not have intended to put suitors in a worse situation than they were in before the act was passed. Now, suppose the cause of action arises in *vacation*, and the original writ is tested in the preceding term, it will appear to have issued before the cause of action arose. Must he, then, to avoid this error, wait till the next term before he takes out a writ; when, before the act, he might have gone to a clerk in chancery, and obtained a writ on any day? This defect in the writ is fatal. It cannot be amended. The cases cited of amendments, are those of *mesne* process, not of original writs. A bad original is not helped by the statute of *jeofails*. (11 *Mod.* 2.) Amendments cannot be made unless there is something to amend by; and here is nothing but the *precipe* on file, and the writ does not vary from the *precipe*. (8 *Co.* 156. *b.* 1 *Salk.* 49. 1 *Ld. Raym.* 564, 565. 7 *Mod.* 250. 1 *Com. Dig.* 449. (D. 1.) 1 *Show.* 80. 3 *Atk.* 595. 598. 2 *Wils.* 117. 3 *Wils.* 342. 9 *Mod.* 308. 10 *Mod.* 270. 2 *Burr.* 966.) No fiction is allowed to help out an original writ. The act must have intended to have made this Court, in regard to writs returnable here, \*the *officina brevium*, instead of chancery; and this *officina brevium* must be always open, in *vacation* as well as term time; otherwise the statute of limitations might run against a demand, in many cases.

*Munro* cited 2 *Sellon's Pr.* 677. 1 *Lily's Ent.* 90. *Legge's Outlawry*, 62. *Johnson's Dict. ad voc.* *Ainsworth's Dict. ad voc.* to show that the words *vadios et plegios* are properly translated by *sureties* and *pledges*.

*Emmet*, contra, cited 3 *Bl. Com.* 280, and *Boote's Suit at Law*, 19., that "*gages*" were goods or chattels, and "*safe pledges*" were *sureties* or *responsible persons*.

*Per Curiam.* The two exceptions taken to the original writ, and upon which the present motion is founded, are, that it should have been in the nature of a summons, and not by *pone* or attachment; and that it should have been tested on the day it was issued, and not on the last day of the preceding term.

With respect to the first exception, it is unnecessary to pursue the very extensive range taken by the counsel on the argument. If this was an action against a private person, there can be no doubt, from the nature of the demand, that the form adopted in this case would be correct. The demand being un-

ALBANY,  
January, 1816.

LYNCH  
v.  
MECHANICS'  
BANK.  
† 12 *Johns.*  
*R.p.* 90.

[ \* 137 ]

ALBANY,  
January, 1816.

LYNCH  
V.  
MECHANICS'  
BANK.

[ \* 138 ]

certain, the general rule is, that where the demand is certain, the original writ is in the alternative, and is called a *precipe*, commanding the defendant to do the thing required, or show why he has not done it; and this is the process by summons. Where the demand is uncertain, the writ is called a *si te fecerit securum*, and is peremptory, commanding the sheriff to cause the defendant to appear in Court, without any option given him to do the thing required, as in the *precipe*; and this is the process by *pone*, which directs the sheriff to put by *gages* and *safe pledges*, the defendant to show wherefore, &c. No precedent of an original writ against a corporation has been shown. But in all the elementary writers, and in all the books of practice, which treat of the proceedings against corporations, it is laid down as the universal rule, that the process must be by summons, and not by attachment; and such would not have been the language of the books, if the same form, in all cases, was to be pursued in proceedings against corporations as against individuals. The alteration in \*the writ is very plain and simple: instead of the words "*then put by gages and safe pledges,*" &c., insert *then summon by good summoners, &c.* In this respect, therefore, the original writ is defective, and it is not amendable. There is nothing to amend by. It cannot be considered a clerical mistake. The writ is conformable to the *precipe*. (1 *Salk.* 52.) The test of the writ depends entirely upon the construction to be given to the statute lately passed on that subject. (Sess. 38. ch. 38.) This statute declares, that all original writs which, according to any law, usage, or custom, have hereto issued out of the Court of Chancery, &c., shall hereafter issue out of, and under the seal of, the Court in which such writ may be returnable, and be tested in the name of the chief justice, first, or senior judge of such Court, observing, in other respects, the form now in use; and giving to this Court the like power which the Court of Chancery had, to make and devise new writs. This statute is rather obscurely worded, and it is a little difficult to say what, precisely, was meant by the expression, "observing, in other respects, the form now in use." There can be no doubt that, according to the established course of proceedings in the Court of Chancery, with respect to original writs, they must be tested after the cause of action arises, and the day they are actually issued. Although the statute might well warrant the construction, that the original writ was still to have a true test, in the same manner as when it issued out of chancery, yet this is not the obvious and necessary interpretation to be given to the act; and it is much more fit and proper that it should be tested like other process issuing out of this Court; and such was, most likely, the intention of the legislature. To assimilate it as nearly as may be to other process, in matters that may be considered in a great measure formal, is less liable to lead to mistakes in the issuing of the writ. And as it is the universal and established rule, with respect to all other process, that it should be tested

in term time, we think it the most fit and proper construction to be given to the statute, that it was intended to apply the same rule to the test of original writs. In this respect, therefore, the writ is correct, but must be quashed upon the first exception taken to it.

ALBANY,  
January, 1816.

HOYT  
v.  
GELSTON.

Motion granted.

\*HOYT *against* GELSTON and SCHENCK.

[\*139]

**H. BLEECKER**, for the defendants, moved to set aside the verdict taken in this cause, at the last *November* sittings, in *New-York*, on the ground of irregularity. (See the next cause.)

In *June*, 1815, the defendants filed their bill in the Court of Chancery against the plaintiff, for a discovery, and for an injunction to stay the suit at law; and having deposited 100 dollars with the assistant register, one of the masters, on the 5th of *June*, allowed the writ of injunction, which was, accordingly, issued, in the usual form, to the plaintiff, his counsel, attorneys, solicitors, and agents. By the 41st rule of the Court of Chancery, of the 7th of *June*, 1806, no injunction to stay proceedings at law could issue, but by the certificate of certain masters, specially designated by the chancellor for that purpose; and, unless the party obtaining it applied to the chancellor, within six weeks after, for an order to continue the injunction, it was dissolved, of course. But by the rule of *June* 24th, 1814, (75th,) the former rule, in this respect, was repealed, and the defendant was allowed, at any time, as well before as after answer, on due notice, and upon the matter of the bill only, to move the chancellor for a dissolution of the injunction; so that an injunction issued by a master remains in full force and effect until dissolved by the chancellor, on motion for that purpose.

On the 12th of *October*, 1815, a motion was made to dissolve the injunction, and an order for its dissolution was made by the chancellor; and, on the 26th of *October*, the defendants in this cause deposited 100 dollars with the assistant register, and entered their *appeal* from the order of the chancellor. A few days before receiving notice of the appeal, the plaintiff had given notice of trial of the cause at the *November* sittings; and when the cause was called on for trial, the counsel for the defendants objected to the Court's proceeding to trial, on the ground that, as the order for dissolving the injunction was appealed from, the injunction must be considered as still operative, and the proceeding, afterwards, by the plaintiff, and his attorney, was a contempt; but the judge ordered the trial to proceed.

Where an injunction to stay proceedings at law was issued on the order of a master in chancery, and the chancellor, on motion for that purpose, ordered the injunction to be dissolved, and the party immediately entered an *appeal* from that order, it was held that the injunction was not revived by that appeal, so as to operate as a stay of the proceedings at law.

Although an injunction operates only on the party, his attorneys, and agents, yet this Court will take notice of an existing operative injunction, for the purpose of promoting the ends of justice, and preserving harmony between the two Courts. (a)

(a) Vide *Gelston and Schenck v. Hoyt*, 1 *Johns. Chan. Rep.* 543.

ALBANY,  
January, 1816.

HOYT  
v.  
GALSTON.

\**Van Vechten*, and *Bleecker*, insisted, that the effect of the appeal was to suspend the operation of the order for the dissolution, and revive the writ of injunction. It was precisely the same, in effect, as if no such order had ever been made. Under the present rule of the Court of Chancery, the allowance of a writ of injunction by a master has the same effect as if it had been by the chancellor. Every proceeding in the nature of an appeal suspends the operation of the order or matter appealed from : if so, the injunction stands with the same force and effect as if issued by the chancellor himself.

It may be said, perhaps, that the injunction operates only on the party, his attorney and counsel, and not on the Court ; but this Court will not be governed by such a strict technical notion, and will take notice of injunctions and proceedings of the Court of Chancery, to prevent any abuse in the administration of justice. Where an execution was delayed after a year and a day, by an injunction, the Court of K. B. took notice of that fact.†

† 2 Burr. Rep.  
660.

*Colden*, for the plaintiff, contended, that the master, in this respect, was the mere officer or instrument of the chancellor, and to allow his order for an injunction to remain in full force, after the order of the chancellor to dissolve it, would be setting the servant above his master. If the plaintiff is wrong in proceeding at law, it is a contempt of the Court of Chancery, and the defendants may apply to that Court for relief ; for it is not pretended that the appeal suspends the power of the chancellor to punish for a contempt. The doctrine contended for, on the other side, as to the effect of an appeal, would lead to the greatest abuse.

*Per Curiam*. There was no irregularity in proceeding to trial in this cause, by reason of the injunction heretofore issued by a master. This injunction had been dissolved by the chancellor. Where there is an existing operative injunction, we should think proper, as a general rule, to notice it, for the purpose of promoting the ends of justice, and of preserving harmony between the two Courts, although the injunction operates upon the parties only. By the present rules in the Court of Chancery, certain masters, designated by the chancellor, are authorized to grant injunctions, and which are binding until dissolved by him. In this case, the injunction had been dissolved, from which order there was an appeal ; and it is now urged, that this appeal suspends all proceedings in this Court, as much as if the injunction was still in full force. To give such effect to an appeal from an order dissolving an injunction, would be very mischievous in practice, and serve as a great engine of delay. We must consider the case now in this Court as if no injunction had ever issued. If the parties have committed any contempt, by proceeding, application must be

made to the Court of Chancery to punish such contempt; but that is a matter with which this Court has no concern. It is enough for us, that there is no existing injunction. Suppose application had been made, in the first instance, to the chancellor, and he had refused the injunction, an appeal would have lain from such refusal; but such appeal would not tie up the proceedings at law. If an appeal was to have such an operation, applications for injunctions might be perverted to the worst of purposes. The motion to set aside the verdict must, therefore, be denied.

ALBANY,  
January, 1816.

HOYT  
v.  
GELSTON.

### HOYT against GELSTON and SCHENCK.

THIS was an action of trespass, brought against *David Gelston*, collector, and *Peter A. Schenck*, surveyor, of the customs of the port of *New-York*, for seizing a vessel called the *American Eagle*, with her tackle, apparel, furniture, ballast, water, salted provisions, and ship-bread, on the 10th of *July*, 1810. The declaration contained several counts, which it is unnecessary to state, and the plaintiff laid his damages at 200,000 dollars.

The defendants pleaded, 1. Not guilty.

2. That, before the 10th of *July*, 1810, to wit, on the 1st of *July*, the *American Eagle*, with her tackle, apparel, and furniture, was attempted to be fitted out and armed, and 500 tons of stone ballast, 100 hogsheads of water, &c., were procured for the equipment of the said vessel, and were then and there on board of her, as part of her equipment, with intent that she should be employed in the service of a foreign state, to wit, of that part of the island of *St. Domingo* which was then under the government of *Petion*, to commit hostilities upon the subjects of another foreign state, with which the *United States* were then at peace, to wit, of that part of the island of *St. Domingo* which was then under the government of *Christophe*, contrary to the form of the statute in such case made and provided; and that, on the 6th of *July*, *James Madison*, president of the *United States*, at *Washington*, did direct the defendants to seize, as forfeited to the use of the *United States*, the said ship, &c.; and that, afterwards, on the 10th of *July*, in pursuance of such authority, they seized the said ship.

Bare possession of a chattel is sufficient to maintain trespass against a wrong doer. (a)

An admission by the counsel of the plaintiff, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages, and, therefore, evidence on the

[ \* 142 ]

part of the defendant, in the nature of a justification of the act, is inadmissible by way of mitigation of damages. (a)

A sentence of restitution, in the District Court of the *United States*, of a vessel which had been seized by a collector, is conclusive evidence, in an action of tres-

pass brought by the owner against the collector, that the seizure was illegal. (b) The parts of the island of *St. Domingo*, respectively under the government of *Petion* and *Christophe*, are not independent states, within the meaning of the act of Congress of the 5th of *June*, 1794, and, therefore, it is not illegal to fit out a vessel for the purpose of assisting the one against the other.

(a) Acc. S. C. in error, *infra*, 561.

(b) Vide *Ocean Ins. Co. v. Francis*, 2 *Wendell's Rep.* 64. *Atkin* ads. *Buck*, 1 *Ibid.* 466. *Gelston v. Hoyt*, in error, *infra*, 561.

ALBANY,  
January, 1816.

HOYT  
v.  
GELSTON.

3 The third count stated, generally, that the *American Eagle* was intended to be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state, with which the *United States* were then at peace; and that she was seized by the defendants, pursuant to the directions of the president.

The defendants subjoined a notice that they would give in evidence, on the trial, that the *American Eagle*, on the 1st of July, 1810, was fitted out and armed with intent to be employed in the service of a foreign prince, or state, to wit, of that part of the island of *St. Domingo* which was then under the government of *Petion*, to cruise and commit hostilities upon the subjects, citizens, and property, of another foreign prince, or state, with which the *United States* were then at peace, to wit, of that part of the island of *St. Domingo* which was then under the government of *Christophe*. And, also, that the said ship was fitted out with intent to be employed in the service of some foreign prince, or state, to commit hostilities upon the subjects of some other foreign prince, or state, with which the *United States* were then at peace; and, also, that the defendants, as collector and surveyor of the customs, did, on the 10th of July, 1810, seize and detain the said ship.

The plaintiff took issue on the first plea, and demurred to the second and third pleas, and the defendants having joined in demurrer, judgment was given for the plaintiff.

The cause was tried on the general issue, at the *New-York* sittings, in *November*, 1815, before Mr. Justice *Spencer*.

[ \*143 ]

\*The plaintiff gave in evidence, that the ship was, at the time of seizure, in the actual, full and peaceable possession of the plaintiff; and that, on her acquittal in the District Court, it was decreed that she should be restored to the plaintiff, the claimant. The proceedings of the District Court of the *United States*, for the district of *New-York*, were also given in evidence; by which it appeared that the *American Eagle* had been libelled, on the ground that she had been fitted out with intent to be employed in the service of *Petion* against *Christophe*; that the plaintiff had filed an answer to the libel, and a claim to the vessel, in which he denied the truth of the allegations in the libel; that, in *April*, 1811, he made application to the District Court to have the ship appraised, and delivered to him, on giving security for the appraised value; that the vessel was appraised at 35,000 dollars, and the appraisement filed, which was not excepted to; and that the sureties offered by the plaintiff, for the appraised value, were accepted by the Court; that the cause was tried, the libel dismissed, and the ship decreed to be restored to the plaintiff; and that a certificate of reasonable cause for the seizure had been denied. The plaintiff also proved, that the value of the ship, at the time of seizure, was 100,000 dollars, and that the defendant *Schenck* seized and took possession of her by the written directions of



*Gelston*. Here the plaintiff rested his cause; and the defendants moved for a nonsuit, which the judge overruled, and delivered his opinion, that the matters given in evidence, on the part of the plaintiff, were sufficient to entitle him to a verdict; to which opinion the defendant's counsel excepted. The plaintiff then proved the sale and delivery of the ship to himself.

ALBANY,  
January, 1816.

HOTT  
v.  
GELSTON

The defendants offered to give in evidence, as a defence, or in mitigation of damages, that the vessel was fitted out to be employed in the service of that part of the island of *St. Domingo* which was then under the government of *Petion*, to cruise and commit hostilities upon the subjects, citizens, and property, of that part of the island of *St. Domingo* which was then under the government of *Christophe*, contrary to the form of the statute in such case made and provided, for which cause the defendants seized her; but the judge overruled the evidence, on the ground that it was inadmissible as a justification; and that it was inadmissible in mitigation of damages, the plaintiff's counsel having admitted that the defendants had not been influenced \*by any malicious motives in making the seizure, and that they had not acted with any view or design of oppressing or injuring the plaintiff, who was thereby precluded from claiming damages, by way of punishment or smart money. The defendants excepted to the opinion of the judge, and the jury found a verdict for the plaintiff, for 107,369 dollars and 43 cents damages.

[ \* 144 ]

The bill of exceptions being returned, according to the directions of the statute, was argued by *Van Vechten*, and *H. Bleeker*, for the defendants, and *Colden*, for the plaintiff.

*H. Bleeker*. 1. The judge, before whom the cause was tried, ought to have granted the motion for a nonsuit. Mere possession is not sufficient to enable a plaintiff to maintain an action of trespass. He must show property or title, either general or special, in the chattel.†

† *Bac. Abr*  
*Trespass, (C.)*

2. The judge ought to have received the evidence offered by the defendants, in justification, or mitigation of damages. If the ship was liable to forfeiture, under the law of the *United States*, it was the duty of the collector to make the seizure, and he was perfectly justifiable.

The 27th section of the act of *February* 18th, 1793, (*Laws of U. S.* vol. 2. p. 160.) makes it the duty of the officer of the revenue to go on board vessels, and to search and examine whether there has been any breach of the laws of the *United States*. The right to seize is independent of any judicial investigation or decision. To authorize a seizure, it is enough that the vessel is found in the predicament mentioned in the act of Congress. By the act of the 5th of *June*, 1794, (*Laws of U. S.* vol. 3. p. 88. 3 *Cong. sess.* 1. ch. 50. sect. 3.) it is declared "that if any person shall, within any of the ports, harbors, bays, rivers, or other waters of the *United States*, fit out and

ALBANY,  
January, 1816.

HOTT  
v.  
GELSTON.

[ \* 145 ]

arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince, or state, to cruise or commit hostilities upon the subjects, citizens, or property, of another foreign prince, or state, with whom the *United States* are at peace," &c.—"every such person, so offending, shall, upon conviction, be adjudged guilty of a high misdemeanor," &c.—"and every such ship or vessel, with her tackle, &c., shall be forfeited, one half to the use of any person who shall give information of the offence, and the other half to the use of the *United States*." Now, the defendants offered to prove, that the *American Eagle* was fitted out, and armed, &c., with intent to be employed in the service of one foreign state, against the subjects or citizens of another foreign state. Then, were not *Petion* and *Christophe* foreign princes, or sovereigns, and their territories foreign states, within the meaning of this act? It is notorious that the whole island of *Hispaniola*, or *St. Domingo*, has been independent of *France* and *Spain* for above 19 years. The mother country has not, during that period, exercised dominion over that island. It is enough that there was a regular government, *de facto*, exercised there, independent of the mother country, to bring the case within the mischief intended to be prevented by the statute. No matter what the form of the government, or the extent of the territory, might be, so long as it is a sovereign and independent state. *Petion* or *Christophe*, in consequence of this ship being sent to the one or the other, might have deemed it an act of hostility, and have fitted out cruisers to capture the vessels of the *United States*—an evil which the act of Congress was intended to prevent. Nations, or states, according to *Vattel*,† are societies of men united together for their mutual safety and advantage. The island of *Hayti* contains near a million of inhabitants. The present governments are as regular and enlightened as most of the boasted governments of the world. That of *Petion* is modelled after that of the *United States*; and the wisdom and moderation of their *president* have been highly extolled. *Christophe* is a king, and the monarchy is hereditary, and is supported by orders of nobility and officers of state. Each government maintains a regular army of 40,000 men. Parochial schools are established throughout the whole island of *Hayti*—an institution superior to any to be found in *Europe*. (a) It is impossible to regard them any longer as colonies.

For the objects of the statute, it is not essential that the government of the *United States* should recognize and publicly acknowledge the independence of the government of either of these sovereigns; the mischief intended to be prevented might equally exist. It was a measure of policy in our government,

† *Vat. Droit des Gens*

(a) See *Edin. Rev.* vol. 24. p. 128. No. 47. Nov. 1814

when, at the instance of the *French* government, in 1805, or \*1806, it prohibited all intercourse with that part of the island of *St. Domingo*, formerly subject to *France*. It was dictated by the fear of occasioning a rupture with *France*. That act, therefore, furnishes no evidence of the real opinion of this government as to the independence of *St. Domingo*. The *British* government, though it made no positive declaration on the subject, has recognized ports or places in *St. Domingo* as not under the dominion of *France*; and on that ground vessels, carrying on trade to *St. Domingo*, have been acquitted in the Court of Admiralty, as not subject to the penalties of trading from an *enemy's colony*.† “When a nation becomes divided,” says *Vattel*,‡ “into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties, in every respect, is the same with that of a public war between two different nations.” They are to be regarded, by foreign nations, as equally independent.

Though the Court gave judgment against the plea, on the demurrer, which the defendants' counsel declined arguing, yet, when the question is again raised in the same or another case, the Court will not refuse to hear an argument, and to pronounce a decision on it; for it may be presumed that the Court decided the demurrer on some other point.

3. But it will be said that the decree of the District Court of the *United States* is conclusive against the justification set up by the defendants. The defendants were not parties to that decision, either in name or interest. The libel was in the name of the *United States*, against the ship called the *American Eagle*, her tackle, &c., and the prosecution was carried on by the attorney of the *United States*. It is the duty of the attorney of the *United States* to prosecute all offences against the laws; and the revenue officers are required to make seizure: one half of the penalty goes to the informer; but it is not stated in the bill of exceptions, and it no where appears, that the defendants were the informers. If the decree of the District Court is to be held conclusive, it will violate the well-known principle, that no man shall be condemned unheard. But, admitting the general rule to be that the sentence of a Court of exclusive jurisdiction, directly on the point, is conclusive, upon the same matter coming incidentally in question in a civil case, in another Court, yet there is an acknowledged distinction between a sentence of conviction, \*or condemnation, and a judgment of *acquittal*.§ An acquittal does not ascertain any precise fact: it may be that sufficient evidence was not produced on the part of the public prosecutor. “A conviction is conclusive evidence of the fact, but an acquittal, as *Buller* observes, is no proof of the reverse.” A verdict on a criminal proceeding, as an indictment for an assault and battery, libel, &c., is not conclusive in a *civil* suit for the private injury. The case of *Scott*

ALBANY.  
January, 1816.

Hoyt  
v.  
GELSTON.  
[\* 146]

† *Manilla*, 1  
Edw. Adm.  
Rep. 1. Append.  
A. B. C.

‡ *Droit des  
Gens*, Liv. 3.  
ch. 18. s. 293,  
294, 295.

[\* 147]

§ *Bull. N. P.*  
215. *Procr's*  
*Lane of Ec.* 48,  
49. (3d ed.) and  
n. 5 *Term Rep.*  
256. 1 *Harg.*  
*Law Tracts*  
472.

ALBANY,  
January, 1816.

HOTT  
v.  
GELSTON.  
† 2 Wm. Bl.  
Rep. 971.  
‡ 4 Co. 29.

v. *Shearman and others*† will be cited on the other side, as to this question; but it will be seen, that Mr. Justice *Blackstone*, who gave the reasons for the decision, puts it on the ground that the plaintiff was a party in interest in the proceedings in the Court of Exchequer. Lord *Coke*, in *Bunting v. Lepingwel*,‡ gives a very quaint reason for regarding the sentence of the ecclesiastical Court as conclusive, namely, *cuiuslibet in sua arte perito est credendum*; it is a reason that would hardly be admitted at the present day. The truth is, that this notion has grown up in *England*, from respect paid to the decisions of certain Courts of peculiar jurisdiction; as, in regard to their ecclesiastical Courts, Lord *Coke* observes, “The judges of our law ought (although it be against the reason of our law) to give faith and credit to their proceedings and sentences, and to think that their proceedings are consonant to the law of holy church.”

But we contend, that this whole doctrine, as to the conclusiveness of the sentences of Courts of peculiar jurisdiction, has been broken down by the decision of the Court of Errors, in the case of *Vandenheuvel v. The United Ins. Co.*§ The same reasons, and the same authorities, were urged by the judges of the Supreme Court, in that case, in favor of the conclusiveness of foreign sentences, as are stated in support of the conclusiveness of the decisions of Courts of peculiar jurisdiction; nay, there were other and stronger reasons brought forward in favor of the former, which cannot be applied to the latter. If, then, by the decision of the Court of last resort, in this state, the whole doctrine as to the conclusiveness of foreign sentences is done away, *a fortiori*, must the rule, as to the conclusiveness of the decrees of Courts of peculiar jurisdiction, be deemed as abrogated.

§ 2 *Caines's*  
*Cases in Error*,  
217—351. S.  
C. 2 *Johns.*  
*Cases*, 127—  
108. 451—458.

[\* 148]

|| 4 *C anch.*  
*Rep.* 2—28.

*Colden*, contra. 1. The decree of restitution shows that the plaintiff had the title as well as the possession. In the Admiralty \*Court, all persons, who have any claim or title, are called on to appear and enter their claims, and the Court decides who has the right, and its decree is evidence of title or property. The principles on which Admiralty Courts proceed, are stated in *Jennings v. Carson*.|| Documentary evidence of title in the vessel was not necessary; parol evidence of acts of ownership would be sufficient. But we contend that, in this action against a *tort-feasor*, it is not necessary for the plaintiff to show title on ownership.

[THOMPSON, Ch. J. You need not press this point.]

2. Then as to the evidence offered in justification. In reason and principle, it must belong to the government, not to its Courts, to declare the facts, as to its political relations, or whether a foreign people are to be deemed and treated as an independent nation.

This very point came under the examination of the Supreme  
123

Court of the *United States*, in the case of *Rose v. Himely*,† Chief Justice *Marshall*, in giving the opinion of the Court, in that case, (*March 2, 1808*,) takes notice of the arguments urged in favor of treating the government of *St. Domingo* as an independent sovereign; and that the doctrines of *Vattel* had been referred to in support of the argument. He very justly observes, that the language of *Vattel* "is addressed to sovereigns, not to Courts. It is for government to decide, whether they will consider *St. Domingo* as an independent nation; and until such decision shall be made, or *France* shall relinquish her claim, Courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of *France* over that colony as still subsisting." It is worthy of observation, that the *English Court of Appeals*, (*March 17th, 1808*,) and Sir *William Scott*, in the High Court of Admiralty, (*April 1st, 1808*,) before whom the same question arose, almost at the same time, lay down precisely the same rule, that, as there had been no declaration or act of the government on the subject, their Courts must still regard that island as a colony of *France*.‡ "That it always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which Courts of justice cannot decide." The same principle was, also, recognized by the present chancellor, \*(*KENT*,) when an application was made to him for an injunction, in this very cause.

Again; the *non-intercourse acts*, as they are called, of the *United States*,§ prohibited all commerce with *France* and *Great Britain*, their colonies and dependencies. Now, it is a remarkable fact, that, at the very time these defendants made this seizure of the *American Eagle*, for being armed and fitted out to aid one of these foreign and independent states, in the island of *St. Domingo*, against the other, they had made two seizures, the schooner *James* and the schooner *Lynx*, for a violation of the *non-intercourse act*, in trading with *St. Domingo*, a colony and dependency of *France*. It is well known that, in 1809, when the plaintiff's vessel was seized, the libels, in the two other cases, were pending in the District Court. Thus these defendants could blow hot and cold, as best suited their purpose.

But we contend, that the question of forfeiture or not, has been decided by a Court of competent jurisdiction, and all parties are now concluded by that decision. It is a settled rule of law, that where a Court proceeds *in rem*, its decision, as to the property, is conclusive; and the right cannot be tried over again.|| It is said, however, that a sentence of acquittal is not equally conclusive; but *Peake*, in the third edition of his treatise on *Evidence*,¶ takes further notice of this distinction, and recognizes the case cited from *Viner*, before Baron *Price*, that an acquittal in the exchequer was conclusive; and the case of *Lane v. Digbey*, cited by *Buller*, (*N. P. 244*.) is to the same

ALBANY,  
January, 1816.HOYT  
V.  
GELSTON.  
† 4 *Cranch's*  
*Rep.* 241—272.† 1 *Edw. Adm.*  
*Rep.* 1—3. *App.*  
(D.) *Pelican*.

[\* 149]

§ *March 1,*  
1809, 10 *Cong.*  
sess. 2. ch. 91  
*June 28, 1809*  
11 *Cong. sess.*  
1. ch. 9. *May 1,*  
1810, ch. 56.|| 12 *Vin. Ab.*  
95. *Ev.* (A. b  
22.)¶ *Peake*, (3d  
edition,) 49, 78  
79, 80. 11 *S.*  
*Ty.* 218. 222  
235. 261. *Amb.*  
756. 2 *Str.* 961.

ALBANY,  
January, 1816.

HOYT  
v.  
GELSTON.  
† *Cooke v.*  
5 Term

effect. (a)† The Court of Errors, in reversing the decision of the Supreme Court as to the conclusiveness of foreign sentences, proceeded on the ground of the great abuse of the general principle in the *English* Courts of Admiralty. They never intended, as has been suggested, to subvert the whole law on this subject. It would be attended with most oppressive and mischievous consequences, if Courts of justice, of distinct and competent jurisdictions, were not to respect the judgments of each other, directly on the same subject, between the same parties.

[ \* 150 ]

‡ S. C. 8 Johns.  
Rep. 179.

If this Court now admit the evidence offered, it will be contrary to their judgment pronounced on the general demurrer to \*the plea. And it may be observed, that these defendants applied to this Court for an *imparlance* in this cause,‡ in order that they might reap the benefit of the decree of the District Court, which they alleged would be conclusive, if the seizure was adjudged to have been rightfully made, or for reasonable cause.

If the evidence was not admissible in justification, it is equally inadmissible in mitigation of damages.

§ *Martens*, b.  
2. ch. 2. s. 10.  
p. 80.

*Van Vechten*, in reply, said, it was a well-settled principle, that where subjects revolt and declare themselves independent, and maintain that independence, it is no violation of duty, in a foreign nation, to treat them as an independent state. We may look to the government, *de facto*, without entering into an examination of the legality of the means by which it has been established.§ Surely the governments at *St. Domingo* have every claim to be respected as independent.

|| 9 Johns.  
Rep. 282.

As to the admissibility of the evidence: it is now the established law of this state, that foreign sentences are only *prima facie* evidence. The doctrine laid down in the Court of Errors has been acted on by this Court.|| The principle of that decision applies to the judgments of other Courts. The decrees of other Courts are never conclusive in other suits, between different parties. These defendants were not parties to the suit in the District Court; they had no claim to put in.

The counsel then proceeded to examine the reasoning and authorities relative to this rule of evidence; but his arguments were, substantially, the same as those of the opening counsel.

SPENCER, J., delivered the opinion of the Court. The bill of exceptions, taken at the trial, presents two points for the consideration of the Court:—

1. Was there sufficient evidence of property in the plaintiff?
2. Ought the evidence, overruled at the trial, to have been admitted either in mitigation of damages, or as a bar to the suit?

(a) In a late "Treatise on the Law of Evidence," (1815,) by *Phillips*, ch. 3. sect. 3. p. 254—259., where this subject is handled, no new cases are cited; and he seems to consider the question, as to the conclusiveness of a sentence of *acquittal*, as still undetermined, as the case of *Cooke v. Sholl* (5 Term Rep. 255.) turned on a different point

ALBANY,  
January, 1816.HOYT  
V.  
GELSTON.

[ \* 151 ]

With respect to the first point, the bill of exceptions states, that the plaintiff gave in evidence, that, at the time of the seizure of the ship *American Eagle*, by the defendants, she was in the actual, full and peaceable possession of the plaintiff; and that, on the acquittal of the vessel in the District Court, it was decreed that she should be restored to the plaintiff, the claimant of the vessel in that Court; and the plaintiff then gave in evidence \*the proceedings in the District Court, by which the above facts fully appeared. In this stage of the cause, and after the plaintiff had proved the seizure of the ship by the defendants, and her value, a motion was made by the defendants' counsel, that the plaintiff should be nonsuited, on the ground that there was not sufficient evidence to entitle the plaintiff to a verdict, no right or title having been shown in the plaintiff to the ship. We are of opinion that the motion for a nonsuit was correctly overruled. It is a general and undeniable principle, that possession is a sufficient title to the plaintiff in an action of trespass, *vi et armis*, against a wrong doer. (1 *East's Rep.* 244. 3 *Burr.* 1563. *Willes's Rep.* 221. *Esp. Dig.* 403. *Gould's* edit. part 2. 289.) The finder of an article may maintain trespass against any person but the real owner; and a person having an illegal possession, may support this action against any person other than the true owner. (1 *Chitty's Pl.* 168. 2 *Saund.* 47. d.) If these principles are applied to this case, it will appear, at once, that the evidence of the plaintiff's right to the ship was very ample. He was not only in the actual, full and peaceable possession of this ship, but he was the claimant of her in the District Court; and she has been awarded to him by a sentence of that Court. The defendants make this objection without a pretence of right, on their part, as they stand before the Court in the character of *tort-feasors*.

In the progress of the cause, the plaintiff proved himself to be the owner of the ship; and even if it was admitted that the proof before given was insufficient, a new trial ought not to be awarded on the ground of want of proof of title in the plaintiff, when that very proof was before the jury, and is now spread on the record. In no point of view have the defendants entitled themselves to a new trial on this part of the bill of exceptions.

Under the second exception, it has been urged, that the matters set forth in the notice ought to have been admitted in mitigation of damages, and as a bar to the suit. They were overruled in both respects; first, because they formed no bar to the suit; and, secondly, because the plaintiff's counsel had distinctly stated and admitted, that the defendants had not been influenced by any *malicious* motives in making the seizure, and that they had not acted therein with any view or design of oppressing or injuring the plaintiff. The presiding judge held that such admission precluded the plaintiff from claiming any damages \*against the defendants by way of punishment or smart money, and that, after such admission, the plaintiff could recover

[ \* 152 ]

ALBANY,  
January, 1816.

HOTT  
v.  
GELSTON.

only the actual damages sustained; and he gave that direction to the jury.

The defendants have no cause of complaint, that the facts set out in the notice were not admitted in mitigation of damages; for the admission made by the plaintiff's counsel was held to preclude him from recovering any thing beyond the actual damages sustained. If the matters contained in the notice do not bar the plaintiff's recovery, he was entitled, at all events, to recover his actual damages; and it is not pretended that he has recovered beyond that amount.

The question, then, presents itself,—and it is the only grave one in the case,—whether the matters contained in the notice, if proved, would operate as a bar to the plaintiff's right of action. This question, in the state of the present record, we should be justified in refusing to hear discussed. The pleas in bar embrace the same matters insisted on in the notice. These pleas have been demurred to, and have been adjudged to be bad. It is true there was not an argument upon them, but it was not a judgment by default. When the cause was called, the defendants' counsel appeared, and declined to argue them, whereupon judgment was given for the plaintiff, on the defendants' counsel declining the argument. This act can be viewed in no other light than as evincing a consciousness, on the part of the counsel, that the pleas were not to be supported; and it is a well-settled principle of practice, that no Court will hear the merits of a case discussed after judgment. Virtually, we have already declared the pleas bad, and we should be justified in refusing to hear counsel tell us that decision in the same cause is incorrect. We were disposed, however, as it had been suggested that this cause would not, probably, rest here, to hear the points argued; and, on two grounds, we are decidedly of opinion, that the facts stated in the notice, if proved, ought not to preclude the plaintiff's recovery. We believe that the sentence of restitution in the District Court is final and conclusive; that sentence not having been appealed from, and still remaining in full force.

It appears that this ship was libelled, as forfeited to the *United States*, on the ground that she was fitted out at *New-York*, with the intent that she should be employed in the service of a foreign state, to wit, that part of the island of *St. Domingo* which was under the government of *Petion*, to commit hostilities upon the \*subjects of another foreign state, with which the *United States of America* were then at peace, to wit, that part of the island of *St. Domingo* which was then under the government of *Christophe* contrary to the statute in that case provided.

The plaintiff appeared before the District Court, as claimant of the ship, and filed his answer to the libel; and, on full hearing, the libel was dismissed, and the ship was decreed to be restored to the plaintiff; and a certificate of reasonable cause for the seizure was denied



It would seem, at once, to be unjust and improper, in an action brought to recover damages for the seizure of property, after it has been restored by the sentence of a Court of competent jurisdiction, for any other Court, and, especially, a common-law Court, to rehear the case, and examine again into the propriety of the sentence, in a collateral manner. It would impugn a very salutary maxim, *Nemo debet bis vexari pro eadem causa*; and it would overturn the well-settled principle, that the judgment of a Court of competent jurisdiction, proceeding upon a matter of which it had cognizance, cannot be impeached collaterally, but that it stands firm until vacated or reversed. But upon authority, without regarding the unreasonableness of the principle contended for, the sentence in this case is conclusive. In *Scott v. Shearman and others*, (2 Wm. Bl. Rep. 977.) trespass was brought against custom-house officers for breaking and entering the plaintiff's house, and taking away his goods. The defendants gave in evidence a copy of the record of condemnation of the Court of Exchequer, condemning a quantity of Geneva, (the goods taken from the plaintiff,) and the principal question was, whether this was conclusive. Justice *Blackstone* delivered the unanimous opinion of the Court, that the condemnation was conclusive evidence to all the world that the goods were liable to be seized, and, therefore, the action would not lie.

In *Henshaw v. Pleasance and others*, (2 Wm. Bl. Rep. 1176.) *Le Grey*, Ch. Justice, *Gould* and *Nares*, Justices, referring to the case of *Scott* and *Shearman*, say, it has been uniformly held, for above a century, that a condemnation of goods, in the exchequer, is conclusive evidence against all the world.

It has been suggested, by *Peake*, that a judgment of acquittal does not seem to have so strong an operation in favor of the party; but, in reference to a case like the present, we perceive no reason for the distinction, nor can such a distinction be supported \*by authorities. In an action of *trover* for a parcel of brandy, before Baron *Price*, *Trinity* vacation, 1716, an information in the name of the attorney-general, in the exchequer, and an acquittal thereupon, and a judgment, were given in evidence, the brandy being seized, &c.; to which the other side objected; but the judge refused to admit any evidence against this determination, or to let the parties in to contest the fact over again which had been tried on the information. (12 Vin. Ab. 95. A. b. 22. pl. 1.) In *Cooke v. Sholl*, (5 Term Rep. 255.) Lord *Kenyon*, unhesitatingly, declared, that a judgment of acquittal, in the exchequer, being a judgment *in rem*, was conclusive as to the question of the illegality of the caption. In *Meadows and wife v. The Dutchess of Kingston*, (Amb. 756.) a bill was filed in chancery, stating the will of the Duke of *Kingston*, the devise by him of his personal estate to the defendant and his wife; that it was founded on fraud committed by the defendant, in imposing herself on the duke as a single woman, thereby inducing him to marry her, when at the time she was the wife

ALBANY,  
January, 1816.

HOTT  
V.  
GELSTON.

[ \* 154 ]

ALBANY,  
January, 1816.

HOTT  
V.  
GELSTON.

of a Mr. *Hervey*, and incapable of becoming the wife of the duke, praying an account of the personal estate of the duke, &c. &c. The defendant, among other things, pleaded a suit in the *consistorial Court of London*, instituted by her against Mr. *Hervey*, for jactitation of marriage, and a cross allegation by Mr. *Hervey*, that he was married to her; and that, upon hearing the cause, the judge, by his definite and final sentence, declared that the defendant then was a spinster, and free from all matrimonial contracts or espousals, more especially with *Hervey*. This plea was argued, and Lord Chancellor *Apsley* held the sentence of the *consistorial Court* to be conclusive; and he laid down the rule to be, that whenever a matter comes to be tried in a collateral way, the decree, sentence, or judgment, of any Court having competent jurisdiction, shall be received as conclusive evidence of the matter so determined. The only distinction he admitted was, where the sentence is not *ex directo*; if it be not, it seems not to be conclusive. (*Peake*, 3d edit. 76—80, and notes, where other cases are cited.) In the present case, the question was direct; Was this ship forfeited for the causes set forth in the libel? The answer of the District Court is, "She was not." We, therefore, have no hesitation to say, that, in a case like the present, the sentence of acquittal is conclusive that the seizure was illegal.

[ \* 155 ]

\*It was suggested, on the argument, that the decision in the District Court is to be regarded as the sentence of a foreign Court, and is, therefore, examinable; but that Court cannot be so considered. It is a Court held in and for the district of *New-York*. It is a Court constituted under the constitution and laws of the *United States*, and it is just as much a *domestic tribunal* as this Court.

If, however, the question of the legality of the seizure could be inquired into, we are equally clear that the matters relied on by the defendants cannot avail them. The supposed ground of the forfeiture of this ship has been already stated: it was that she was fitted out within the *United States*, with intent that she should be employed in the service of a foreign state, to wit, that part of *St. Domingo* which was under the government of *Petion*, to commit hostilities upon the subjects of another foreign state with which the *United States* were then at peace, to wit, that part of *St. Domingo* which was then under the government of *Christophe*.

To work a forfeiture of this ship under the act of Congress, (*L. U. S. vol. 3. p. 88.*) it was incumbent on the defendants to make out that that part of *St. Domingo* which was under the government of *Petion*, as also that part which was under the government of *Christophe*, were, respectively, independent states, within the meaning of the act. On this part of the case, this Court adopt the opinion expressed by Chief Justice *Marshall*, in *Rose v. Himley*, (4 *Cranch*, 272.) "The colony of *St. Domingo*, originally belonging to *France*, had broken the

bond that connected her with the parent state, and declared herself independent, and was endeavoring to support that independence by arms. *France* still asserted her claim of sovereignty, and had employed a military force in support of that sovereignty. A war, *de facto*, then unquestionably existed between *France* and *St. Domingo*. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated, by other nations, as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of *Vattel* have been particularly referred to; but the language of that writer is obviously addressed to sovereigns, not to Courts. It is for government to decide whether they will consider *St. Domingo* as an independent nation; and until such decision shall be made, or *France* shall relinquish her claim, Courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of *France* over that colony as still subsisting."

ALBANY  
January, 1816.

RUSSELL  
v.  
BARNES.

[\* 150]

On the trial of this cause, it was proved that, under the non-intercourse act, as late as 1809, vessels and cargoes were libelled, on the seizure of the defendants, for holding intercourse with *St. Domingo*, as a dependency of *France*; and that our government have so considered that island is a matter of public notoriety. If these Courts are to consider the sovereign power of *France* as still subsisting over that colony, the fitting out of this ship, as stated in the pleas and notice, was not an infraction of the statute; for neither *Petion* nor *Christophe* were sovereign princes or states; and it was not, therefore, a fitting out with an intent that this ship should be employed in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property, of any other foreign prince or state with whom the *United States* were at peace.

For these reasons we are of opinion that the motion for a new trial must be refused, and that the plaintiff have judgment on the verdict.

Judgment for the plaintiff.

### RUSSELL against BARNES.

*D. S. JONES*, for the defendant, moved for judgment, as in case of nonsuit, in this cause, for not bringing on the cause to trial at the last sittings in the city of *New-York*, and read an affidavit.

*I. Hamilton*, contra, objected, that the affidavit did not state that the cause could have been tried in its order, or that younger issues had been tried.

On a motion for judgment, as in case of nonsuit, for not bringing to trial an issue joined in the city of *New-York*, the affidavit must state that the cause could have been tried in its order or

the calendar, or that younger issues were tried. (c)

(a) Vide *Currie v. Moore*, 1 Johns. Rep. 492. *Ross v. Vaughan*, 3 Id. 442. acc

ALBANY,  
January, 1816.

SLOAN  
v.  
WATTLES.  
[ \* 157 ]

*Per Curiam.* In regard to issues joined in the city and county of *New-York*, the affidavit on a motion for a nonsuit, for not \*proceeding to trial, ought to state that the cause might have been tried in its order on the calendar, or that younger issues were tried. We cannot, judicially, take notice of the fact.

Motion denied.

JACKSON, *ex dem.* BARHYDT, *against* CLOW.

Where a plea, *puis darrein continuance*, is filed in term time, a copy of it must be served; but where the matter of the plea arises in vacation, so as it can only be offered at the circuit to prevent a trial, no copy is necessary.

ISSUE was joined in this cause the 29th of *May*, 1815, the venue being laid in the county of *Schenectady*. On the 16th of *October*, in *October* term, the defendant filed a plea, *puis darrein continuance*, and afterwards, but before the circuit at which the cause was noticed for trial, which was held on the last day of *October*, or 1st of *November*, a copy of the plea was served on the plaintiff's attorney, who, without regarding the plea, or entering it on the nisi prius record, had the defendant called, and on his default in not confessing lease, entry, and ouster, a nonsuit was entered. A certified copy of the plea was tendered at the circuit, when the cause was called.

*M'Koun*, for the defendant, moved to set aside the nonsuit, and all subsequent proceedings, for irregularity, with costs.

*J. V. N. Yates*, *contra*.

*Per Curiam.* The plea of *puis darrein continuance* was put in in proper time; and the only question is, whether the defendant was bound to serve a copy of it at the time. Where the matter of the plea arises so as to render it necessary that the plea should be filed in term time, a copy of it must be served; but where the matter arises in vacation, so that the plea can only be offered at the circuit, in order to prevent a trial, a copy need not be served.

Motion denied.

[ \* 158 ]

\*SLOAN *against* WATTLES.

The attorney may alter the test and return day of a *capias* before it is served; and where the sheriff is authorized and instructed by the attorney to alter the return day, in case the writ cannot be served before, he may make the alteration before bail is taken or appearance is endorsed. (a)

*N. WILLIAMS*, for the defendant, moved to set aside the *capias* in this cause, on the ground that the sheriff had altered the return day of the writ.

It appeared that the plaintiff's attorney, on sending the writ to the sheriff, had instructed him, in case he did not receive the writ in time to be served before the return day, to alter it. The sheriff served the writ, and was about taking a bond for appearance, when he discovered that the return day was

(a) Vide *Sullivan v. Alexander*, 18 *Johns. Rep.* 3. *Filkins v. Brockway*, 19 *Johns. Rep.* 170. *People v. Singer*, 1 *Coven*, 41. *Ross v. Luther*, *id.* 42. note.

past; he then altered the return day, and served the writ anew.

ALBANY,  
January, 1816.

*I. Hamilton, contra.*

FORBES  
v.  
GLASHAN.

*Per Curiam.* The attorney might have altered the test and return of a writ before it had been served; and the sheriff was fully authorized, by the attorney, to make the alteration, in case it should be necessary. We think the sheriff, in this case, had not proceeded so far but that he might exercise the power given to him by the attorney, and that the motion, therefore, ought to be denied.

Motion denied.

### FORBES and NELSON *against* GLASHAN.

*HENRY*, for the plaintiffs, moved to set aside the conviction of forcible entry and detainer, in this case, for irregularity, and that *Forbes* and *Nelson* be restored to the lot and messuage, &c., of which they had been dispossessed by means of the conviction, or for such order as the Court might think proper to grant, in the premises. He read a great many papers and affidavits, \*but the important point on which he rested his application, was the want of due service of notice of the time and place of executing the warrant of inquiry of the entry and detainer. The justice, in his return, stated the service to have been by delivering the notice in writing to the person against whom the complaint was made; but it appeared, from the affidavit of the person who served the notice, and which affidavit it was agreed should be considered as part of the return, that "he, the deponent, did not find *Forbes* and *Nelson* on the premises, at the time of serving the notice, but he put up the same on the house, in a conspicuous place, and gave notice to a woman, then in the house, and on the premises, of the said notice."

The service of notice of inquiry, in a case of forcible entry and detainer, must be either by affixing a notice in writing on some public

[ \* 159 ]

and suitable place on the premises, as the front door of the house, or by delivering the notice personally to the party against whom the complaint is made, if on the premises.

Where the affidavit of service of notice stated, that the party was not on the premises, and that the notice was "put up on the house in a conspicuous place," it was held not to be sufficient, and the conviction was set aside, and re-stitution awarded.

*I. Hamilton, contra*, cited *Shotwell's* case, 10 *Johns. Rep.* 304. (See *S. C. Clason v. Shotwell*, in Error, 12 *Johns. Rep.* 31.)

*Per Curiam.* We consider the affidavit of the service of the notice, by the consent of the counsel, as if incorporated in the return. The act (sess. 11. ch. 6. s. 3. 1 *N. R. L.* 96.) (a) directs, that a notice in writing, of the time and place of the return of the precept of inquiry, should be "affixed up in some public and suitable place, upon the lands or tenements," &c., "or be delivered to the party against whom such complaint is made, if such party be on the premises." The true construction of the act is, that the service must be on some public and suitable place on the premises, or personally on the party. It should appear that every thing had been done, in the power of the party, to bring the notice home to the person who was en-

(a) 2 *R. S.* 508.

ALBANY,  
January, 1816.  
GENERAL  
RULE.

titled to receive it, according to the intention and direction of the act. The affidavit, in this respect, is defective. If it had stated that the notice had been affixed on the front door of the house, or in a public and suitable place, it would have been sufficient; but we can intend nothing but what is expressly stated in the affidavit. The proceedings, therefore, must be set aside, and the possession restored.

The following rule was accordingly entered. "Ordered that the conviction of forcible entry and detainer, in this cause, be set aside, or quashed, for irregularity; and that the said *James Forbes* and *James Nelson* be restored to the possession of the lot and messuage of which they have been dispossessed by means of the said conviction."

[ \* 160 ]

\*GENERAL RULE.

January 12th, 1816.

ORDERED, that the *sixth* Rule of *January* term, 1799, as to preparing, amending, and settling cases, shall extend to cases made subject to the opinion of the Court.

END OF JANUARY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, 1816, IN THE FORTIETH YEAR OF OUR INDEPENDENCE.

---

### GRACIE *against* THE NEW-YORK INSURANCE COMPANY.

THIS was an action on an open policy of insurance, dated the 8th of May, 1807, on the cargo of the *American* ship *Mary*, *Richards* master, on a voyage "at and from *New-York* to *Antwerp*; if blockaded, to a port not blockaded," "upon coffee in casks, sugar, and ashes." "Warranted not to abandon, if captured, until condemnation, or until after a detention of six months after advice is received of her capture. The exporter, not the importer." The cause was tried at the *New-York* sittings, before Mr. Justice *Yates*, in May, 1814, subject to the opinion of the Court, on a case, with permission to either party to turn the \*same into a special verdict. The case, however, instead of stating the facts as they would have been found by the special verdict of a jury, set out all the *evidence*, consisting of depositions, letters, &c., in *hæc verba*.

The following are all the parts of the evidence it is thought material to state:—

The master, in his deposition, stated, that the ship sailed on the voyage insured, the 10th of May, 1807. On the 10th of June, she was boarded by an *English* privateer, and carried into *Portsmouth*, in *England*, where the master made his protest; and, being released by an order of the Court of Admiralty,

customs. On application by the consignees, leave was obtained from the *French* government, through its ministers, to land the cargo, under the direction of the officer of the customs, on condition of its being placed in *depot*, in the custom-house stores, until the decision of the Emperor of *France* could be obtained.—After remaining in this state of sequestration until 1810, the cargo was sold by order of the emperor, and the proceeds paid into his *casse d'amortissement*. Held that there was a total loss of the cargo, by the arrest, restraint, and detainment, of the *French* government.

Insurance on a cargo "from *New-York* to *Antwerp*." During the voyage, the ship was boarded by a *British* privateer, and carried into *Portsmouth*, in *England*, and, after a short detention, was released, and, on arriving in *Flushing* roads, an armed force was put on board, and continued until her arrival at *Antwerp*, on the 21st of July, 1807, where she was not suffered to land her cargo, nor to depart with it, the armed force being kept on board by the officer of the

[ \* 162 ]

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. INS. CO.

he sailed on the 11th of *July*, and arrived in *Flushing* roads on the 14th of *July*, when they took on board a pilot. An armed force was put on board, which continued on board until the ship reached *Antwerp*, and until the cargo was landed. There were two or three ships of war lying in *Flushing* roads at the time the *Mary* entered there; and she could not have gone to sea again without being boarded by some of them. The armed force which came on board, inquired of the master, whether he had been in *England*, and he answered, that he had been captured and carried in there. Nothing was said about his being allowed to enter and land his cargo at *Antwerp*; nor was he warned not to go there, or to any other port. The master stated that he had no control over his ship, nor the power of directing where she should go, until after the cargo was landed. That, when the ship arrived at *Antwerp*, the custom-house officers, in consequence of the ship having been carried into *England*, kept the armed force on board of her, and refused to give permission to land the cargo, until the 25th of *August*, when permission was received, as he understood, from *Paris*, to land the cargo, on condition that it should be deposited in the stores of the custom-house, which was, accordingly, done. The armed force on board he believed to be *Frenchmen*, but he neither understood nor spoke *French* or *German*. On his cross examination, he verified a protest made by him at *Antwerp*, and stated, that several *American* ships were at *Antwerp*, in the same situation, none of which left that place with their cargoes. He never inquired of the consignee, or any other person, whether he could depart with his cargo, but waited for orders for landing it, and did land it, in pursuance of orders received from the consignee, on the 25th of *August*, and returned to *New-York* with the ship in ballast. The clerk of the consignees, and a custom-house officer, also, took an account of the landing of the cargo; and the clerk gave a receipt on his set of the bills of the lading. That he had no communication with the custom-house officers at *Antwerp* before landing his cargo; he did not remember whether he entered his ship, or not, before he had orders to land his cargo; that he knew nothing of any permission from *Paris* to land it; that he acted in pursuance of orders from the consignees, by whom he was directed to land it. He did not know for what purpose the armed men were put on board, but supposed it was to guard the vessel; nor did he recollect their number, nor whether the same men who came on board at *Flushing* continued to *Antwerp*; they might have been the same or others. He knew nothing of any arrangement between the consignees and the *French* government about landing the cargo, nor of the terms or conditions on which it was landed. That he did not know the reason why he did not state, in his protest, that the vessel was taken possession of by an armed force in *Flushing* roads, but supposed that he did not think it necessary. Several

[ \* 163 ]



of the master's answers, in this respect, to the questions put to him, appeared confused and inconsistent.

*Jacob Ridgeway*, who was the *American* consul at *Antwerp*, and resided there from 1801 to 1808, and, afterwards, at *Paris*, until 1810, deposed, that the *Mary*, and several other ships, which he specified, arrived at *Antwerp*, in 1807, and had either been boarded by *English* vessels, or touched at *English* ports, and some of them were consigned to his house. That they were not permitted to depart with their cargoes; and demand, for that purpose, was made to the director of the customs, and, afterwards, to the Emperor of *France* through the minister, but without effect. The whole of their cargoes were put into *depot*, or the stores of the custom-house, and were, afterwards, sold by the special order of the emperor, and the proceeds placed in his *caisse d'amortissement*, or sinking fund. That the *Mary* was consigned to *Parish & Co.*, and he did not believe that she could have departed without a special order from the emperor, and he did not believe that any such order could have been obtained; and his impression was, that the consignees did endeavor to obtain such permission, through the agents of the government. The cargo of the *Mary* was placed, by the order of the director of the customs, in the *depot*, or custom-house stores, and under the direction \*of the officers of the customs. The consignees could not either sell or deliver the cargo; it was sold by order of the emperor. The custom-house officers said they could not permit any *American* vessels, which had been boarded by *British* vessels, or touched at *British* ports, to depart, without the special leave of the emperor; and he believed the *Mary* could not have left *Antwerp*, with her cargo, without such special permission. He did not know whether force was used in landing the cargo, but believed it was landed by direction of the custom-house officer. The cargoes of all the seven vessels mentioned by him, including the *Mary*, were landed and placed in *depot*, &c., under sequestration; and contrary, he believed, to the wishes of the consignees. As to the vessels consigned to his house, he spoke positively. Repeated applications for permission to depart, with their cargoes, were made without success. There was no prohibition, in this respect, as to vessels which had not been boarded by *British* ships of war, or touched at *British* ports.

The consignees, in their letter to the plaintiff, of the 23d of *July*, 1807, after mentioning the arrival of the *Mary*, say, "they are going to send all her papers to *Paris*, in order to obtain leave to land her cargo." "The cargo will remain under the control of the custom-house, until a decision, which we have no great hopes of being shortly given." In their letter of the 10th of *August*, they write: "We are yet without any decision," &c., "nor have we obtained leave to land the *Mary's* cargo." In *September* following, they again wrote: "Enclosed you will find a printed note, by which you will see that our government

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. Ins. Co

[ \* 164 ]

NEW-YORK,  
May, 1816.

GRACE  
v.  
N. Y. Ins. Co.

[\* 165]

is fully determined to enforce the execution of the decree of the 21st of *November*." "Not long after we wrote you last, we had leave to land the *Mary's* cargo." "We are apt to imagine that something is still to be determined in regard to such vessels whose cargoes have been landed, by permission of the director-general of the customs, authorized by the minister of finance. Are those cargoes to be admitted, or not? Are they to be admitted under certain restrictions or conditions, or are they to be sent back?" In their letter of the 14th of *April*, 1808, they say: "We have not discontinued a moment doing every thing we could to obtain the admission of the sequestered cargoes *per the Perseverance and Mary*; but all without success." "We still flatter ourselves that, whatever may be the decision which may be pronounced hereafter, in regard to the *American* cargoes \*seized in our ports, in consequence of the decrees of the 23d of *November* and 17th of *December*, 1807, there will be an exception made in favor of those which, like yours, have, previously to these decrees, been admitted, provisionally, by the minister of finance, and the director-general of the customs." "We have petitioned to be permitted to re-export those cargoes; but we do not suppose it will be granted."

In their letter of the 30th of *May*, 1808, they wrote: "We continue in the same uncertainty as to the *sequestered* cargoes; no decision having yet been given." On the fourth of *August*, 1808, they again wrote: "We have the honor to inform you, that, by an imperial decree lately issued, it is ordered, 1st. That the cargoes entered into our ports, before the decrees of *November* and *December*, 1807, (which comprehend those under sequestration,) be sold immediately by public sale, and the proceeds be paid into the *caisse d'amortissement*. 2. That an inquiry shall be made, in order to prove that the goods are not *British* property. 3. That the emperor reserves to himself the right of pronouncing on the result of such inquiry."

It appeared, from subsequent letters, that, after exhibiting the fullest proofs of *American* property, and various applications, no release of the cargo could be obtained; but it was, in *June*, 1810, sold by order of the emperor, and the proceeds paid into the *caisse d'amortissement*. On receiving information of the sale, the plaintiffs, on the 13th of *July*, 1810, made a formal abandonment to the defendants for a total loss.

*D. B. Ogden*, and *S. Jones, jun.*, for the plaintiffs. They cited *Speir v. New-York Ins. Co.*, 3 *Johns. Rep.* 88. *Mumford v. Phoenix Ins. Co.*, 7 *Johns. Rep.* 449. 460. *Brown v. The Phoenix Ins. Co.*, 4 *Binney's Rep.* 445. 5 *Binney*, 403. *Savage v. Pleasants*.

*T. A. Emmet*, and *Wells*, contra.

PLATT, J. The plaintiff claims as for a total loss, under a policy of insurance upon the cargo of the ship *Mary*, on a vow

age "at and from *New-York* to *Antwerp*; if blockaded, to a port not blockaded." "Warranted free from seizure, for, or on account of, any illicit or prohibited trade."

On her voyage, the ship was captured by an *English* privateer, \*and carried into *Portsmouth*, where she was liberated by a decree of admiralty, and then pursued her voyage.

On the 21st of *July*, 1807, she arrived at *Antwerp*, and moored off the city.

About the 1st of *September*, 1807, the cargo was landed at *Antwerp*; and, I think, the only question is, whether, at the time it was so landed, it was under the "arrest, restraint, or detention" of the *French* government.

By the 7th article of the *Berlin* decree, (21st of *November*, 1806,) it was ordained, that "no vessel coming directly from *England*, or from the *English* colonies, or having been there since the publication of the present decree, shall be received into any port."

To go into a *French* port, for the purpose of requesting a special permission to land a cargo, upon a full explanation that the vessel had come directly from an *English* port, would not be a violation of the *Berlin* decree, whether such application were successful or not. For, if the *French* government refused permission to land the cargo, the legal consequence was, that the vessel had a right to depart with her cargo, and seek another market; and if permission for landing the cargo was granted, with a full knowledge that the vessel had come from an *English* port, such consent (by the emperor himself, as in this case) would be a revocation of that decree, in regard to that particular ship and cargo.

The 8th article of the *Berlin* decree provides, accordingly, that "every vessel contravening the above clause, by means of a false declaration, shall be seized; and the vessel and cargo confiscated, as if they were *English* property."

I can, therefore, see no ground to suppose that the cargo of the *Mary* was seized and condemned for a violation of the *Berlin* decree; especially as the decree of condemnation does not allege that as the cause. If the assured had committed an infraction of the *Berlin* decree, why was the ship permitted to depart? The penalty of that decree was a forfeiture of the vessel, as well as her cargo.

It is observable that the condemnation of this cargo was not until after the *Milan* decree of the 11th of *November*, 1807, although the sequestration was long before that decree.

The *Milan* decree declares all foreign vessels lawful prize, \*which have submitted to be searched by an *English* ship, or have come from an *English* port.

The fair presumption is, that, in condemning this cargo, the emperor exercised a special arbitrary power, *ex post facto*, inasmuch as the case of the *Mary* was exactly within the policy of

NEW-YORK,  
May, 1816.

GRACIE  
V.  
N. Y. INS. Co.  
[ \* 166 ]

[ \* 167 ]

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. Ins. Co.

the *Milan* decree, although she came into the *French* port fifteen months before the date of that decree.

There is, therefore, no evidence of a breach of warranty, on the part of the assured, against "*illicit and prohibited trade.*"

But if the landing of the cargo were the voluntary and unconstrained act of the consignees, having the free election, either to send away the cargo, or to land it, then it is clear that the defendants are not liable, because their risk terminated upon the safe and unrestrained landing of the goods insured, at the port of destination.

That the cargo was sequestered, and, afterwards, sold by order of the *French* government, is undeniable; and the only material inquiry is resolved into a question of fact, viz. Was the seizure, or sequestration, in this case, *before the landing of the cargo*?

The testimony of *Richards*, the master, upon his direct examination, is clear and explicit, that when the *Mary* arrived in *Flushing* roads, there were two or three ships of war there; that an armed force was put on board the *Mary*; that they inquired of him whether he had been in *England*; that he informed them he had been captured and carried in there; that the armed force continued on board until the arrival of the ship at *Antwerp*, and until the landing of the cargo; and that he never had the control of the ship, nor the power of directing where she should go, until after the cargo was landed; that, on the 25th of *August*, 1807, (he understood,) permission was given to land the cargo, on condition that it should be deposited in the stores of the custom-house; and it was landed and deposited accordingly.

The credit of the master is in some degree impeached by his confused and incoherent answers to the cross interrogatories; but it is strongly corroborated by the testimony of *Jacob Ridgeway*, then *American* consul residing at *Antwerp*.

He swears; that, at the time when the *Mary* lay at *Antwerp*, with her cargo on board, there were six other *American* vessels, with their cargoes, also lying there, all having, like the *Mary*, \*touched at an *English* port on their voyage to *Antwerp*; that four of those vessels were consigned to himself; and the other three, including the *Mary*, were consigned to *David Parish & Co.* He further swears, "that the said vessels which came addressed to his house, and which had touched at *English* ports in their passage out, were not permitted to depart with their cargoes; that he demanded permission for the departure of their cargoes; the first demand was made to the director of the customs, and afterwards to the Emperor of *France*, through the medium of his minister, *all without effect.*" He further testifies, that, "to the best of his knowledge and belief, the whole of the cargoes of those seven vessels were put into the depot, or custom-house stores, and were, afterwards, sold by a *special order* of the emperor, and the funds arising from the sales placed in his *caisse d'amortissement*

With regard to the ship *Mary*, he says, "I do not believe it was possible for her to have departed from *Antwerp*, with her cargo, for any other port, without the special permission of the Emperor of *France*. I do not believe that any such permission could have been obtained; and the impression of my mind is, that the consignees (of the *Mary*) did make efforts to obtain such permission." Mr. *Ridgeway* further testifies, that "the cargo of the *Mary* was deposited, by order of the directors of the customs, in the depot, or custom-house stores, and under the control of the custom-house officers. The consignees could not, to the best of his knowledge and belief, either sell or deliver said cargo;" and "this cargo was sold by *special order* from the emperor;" that "the reason assigned by the custom-house officers, for not permitting *American* vessels that had either been boarded by *British* ships of war, or touched at *British* ports, to depart with their cargoes, was, that they could not do it without the special permission of the emperor." He further adds, that "the cargoes of the seven vessels were all landed and put into the depot, under sequestration, as he believes, contrary to the wishes of the consignees."

NEW-YORK,  
May, 1816.

GRACIE  
V.  
N. Y. INS. CO

*Ridgeway's* official station afforded him the best means of knowing, and it was his duty, as *American* consul, to ascertain the truth on that point. He swears that, on inquiry at the proper office, he was told that "*American vessels*, having touched in *England*," &c., could not be permitted to depart with their cargoes, without special permission of the emperor. I consider \*this declaration as strong evidence, in itself, of "restraint" upon this vessel, to which the language of the public officer was expressly applicable. "Arbitrary restraint of princes" is often exercised in an equivocal and insidious manner; and it may not be the less certain, although the evidence of it be not frankly and palpably addressed to our senses. The testimony of *Ridgeway*, although less positive and direct, in regard to the *Mary*, is positive proof, to show that the three cargoes consigned to him were under arbitrary restraint; and that fact alone greatly strengthens the credibility of Captain *Richards*, who swears, positively, as to the like restraint upon the cargo of the *Mary*; all those cargoes being in the like predicament.

[ \* 169 ]

The extracts of letters from *David Parish & Co.*, to the plaintiff, are not inconsistent with the testimony of Captain *Richards* and that of Mr. *Ridgeway*. These letters do not expressly state when, and how, the seizure of this cargo was made; but they speak of it as "*under sequestration*," before the decree for its sale; and, if *sequestered*, when did that take place? It remained in the depot, under the entire control of the government, from the moment of its landing until the decree of sale; and whether the sequestration took place as soon as the vessel arrived in the *Scheld*, or at *Antwerp*, as may be inferred from the testimony of *Richards* and of *Ridgeway* or whether

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. Ins. Co.

the cargo was sequestered while in the very act of landing, it was equally covered by the policy.

It is worthy of remark, that the letters of *David Parish & Co.* were written while they were within the reach of the strong and despotic arm of *Napoleon*; and that all their letters were liable to his inspection; which may account for their writing as *little*, and as *seldom*, as possible, of the violent acts of the *French* government; especially as they were, during all that time, most humbly supplicating the clemency of *Napoleon*, in regard to this very cargo. It would, therefore, have been impolitic and unsafe to have written the plain truth, that these goods were seized as soon as they came within the power of the *French* government; not for the violation of any law, but as an act of capricious and arbitrary despotism. From the whole tenor of their letters, however, I cannot entertain a doubt, that, if interrogated expressly upon the point, they would have sworn, in accordance with the other witnesses, that the cargo was held under the control of the government, so that it could neither be \*landed, nor exported, by the owner, at any time after its arrival at *Antwerp*.

[ \* 170 ]

It appears that the cargo was landed upon the express application and request of the consignees, under a condition that it should remain in the *depot*, under the control of the custom-house, until the emperor's decision should be made. But if the cargo was under *arrest* or *sequestration* while it remained on board the ship, in port, the benefit of this policy was not waived, nor lost, by consenting to the landing of the cargo under the restriction imposed. The petition to land the goods, under such circumstances, was a request merely to *modify the restraint*, already imposed by the government, by removing the sequestered cargo from the ship to the store-house; both equally within the territory and control of the *French* government. The fair and legitimate object of that modification, undoubtedly, was, that the *ship might depart*; to which there was then no impediment.

I think the decided weight of evidence establishes the fact, that the cargo of the *Mary* was lost to the assured, by the "*arrest, restraint, or detainment*" of the *French* government, without any breach of warranty against "*illicit or prohibited trade*" on the part of the assured; and, therefore, the plaintiff is entitled to recover.

YATES, J., and VAN NESS, J., were of the same opinion.

THOMPSON, Ch. J. The decision of this case depends entirely upon the *question of fact*, whether there was a voluntary landing of the cargo, or whether it was landed under the coercion of the force stated by the master to have been put on board. If the facts in the case will warrant the conclusion, that the *Mary* was seized by a military force, and the cargo landed under such constraint, and against the consent of the consignees, I  
:46

should entertain no doubt but that the underwriters were liable for the loss. This was not a seizure or detention for, or on account of, any illicit or prohibited trade. There was no attempt whatever to trade, or to do any act in contravention of any municipal regulation. A mere entry into the port of *Antwerp* was no breach of that warranty. Nor could there be any pretence to charge the assured with a violation of the *Berlin decree*.

That decree declares, that "no vessel coming directly from *England*, or her colonies, or having been there since the publication \*of the decree, shall be admitted into any port of the *French* dominions; and that every vessel, that, by a false declaration, contravenes the foregoing disposition, shall be seized, and the ship and cargo confiscated as *English* property." There was no pretence that there was any attempt, on the part of the assured, to obtain an entry in violation of this decree. If, therefore, this cargo was forcibly taken from under the control of the master and consignees, it was a lawless and arbitrary act, and the loss would come under the general peril of arrests and detention of princes. But if, on the contrary, the conclusion to be drawn from the facts in the case is, that the consignees, finding that the *Mary* came within the *Berlin decree*, and that they could not procure an unconditional entry and landing of the cargo, voluntarily consented to have the same deposited in the stores of the custom-house, for the purpose of procuring a dispensation of the decree, and permission to sell the cargo, the underwriters are not responsible for the subsequent loss. If the consignees chose to speculate upon the chance of obtaining a relaxation of the decree, they must do it at the risk of the assured, and not of the underwriters. And, with respect to this question of fact, very considerable doubt may well be entertained. Much depends upon the credibility of the master, who certainly appears, in the case, to have exposed himself to very considerable suspicion; and I very much regret that such a case is presented to the Court for decision: it more properly belonged to the determination of a jury. This is enforced by the circumstance, that there is a provision for turning the case into a special verdict, which certainly cannot be done, if my understanding of the point on which the cause will turn be correct. The jury must find that fact; and not merely state the evidence of the fact. The conclusion is to be drawn by them, and not by the Court. But, as the parties have seen fit to submit the case to the Court, in its present shape, it becomes necessary to weigh the evidence, and draw such conclusion as, in my judgment, it will warrant.

The testimony of the master, and the inference to be drawn from the letters of the consignees, would certainly seem to warrant very opposite conclusions. The master states, that on the *Mary's* being moored off the city of *Antwerp*, an armed force was put on board, and continued there until after the landing of the cargo; that the control of the ship was entirely \*taken

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. INS. CO.

[ \* 171 ]

[ \* 172 ]

NEW-YORK,  
May, 1816.

GRACIE  
v.  
N. Y. Ins. Co.

from him; and that this armed force was kept on board by the custom-house officers, in consequence of the *Mary's* having been carried into *England*. He states nothing of this, however, in his protest, and gives no satisfactory explanation why he did not. An attentive examination of the testimony of *Ridgeway* would seem to warrant the conclusion, that the custom-house officers would not permit vessels that had touched in *England* to depart without the special permission of the emperor; he, as consignee in several cases, had failed in obtaining such permission. There is no evidence, however, that such permission was asked, in this case, until some time in the year 1808. But none of the letters from the consignees seem even to hint that there was any compulsion in landing the cargo; and it is hardly conceivable, if that had been the case, that the consignees would not have mentioned so important a circumstance. The drift of all their letters, is to show that they were using every exertion to obtain *permission* to land the cargo. The *Mary* arrived on the 21st of *July*, and the cargo was not landed until the 25th of *August*. On the 23d of *July*, the consignees write: "We are going to send all her papers to *Paris*, to obtain leave to land her cargo." And on the 10th of *August* they again write, that they had not yet obtained leave to land the *Mary's* cargo; not an intimation of any difficulty of sending away vessel and cargo, or of asking leave for that purpose. On the 11th of *September*, they enclose a printed note, announcing the determination of the *French* government to enforce the execution of the *Berlin decree*, although the vessel might have been forcibly carried into *England*; and that a *Portuguese* vessel had already been sent away. They then say: "Not long after we wrote you last, we had leave to land the *Mary's* cargo, which was done in three days, without any *molestation*;" and they go on to state, that "something is still to be determined in regard to vessels whose cargoes have been landed by *permission* of the director-general of the customs. In the letter of the 14th of *April*, 1808, after speaking of seizures under the *Milan decree*, they say: "There will be an exception made in favor of those which, like yours, have, previously to those decrees, been *admitted provisionally* by the minister of finance." And in this letter, for the first time, they speak of having made application to be permitted to re-export the cargo. From an examination of these letters, it is difficult, if not impossible, to resist the conclusion, that the cargo of the *\*Mary* was landed, at the earnest and pressing solicitation of the consignees, who, finding that they could not obtain an unconditional entry, procured the cargo to be *admitted provisionally*, as they term it; to remain in custody of the custom-house officers, until the determination of the emperor should be known on the subject; and this may account for there having been put on board a military force, by the custom-house officers, for its safe keeping. The captain says it was landed on condition that it should be deposited in the

[ \* 173 ]



stores of the custom-house ; and was landed in pursuance of orders from the consignees, who gave him a receipt for the same. A clerk of the consignees and a custom-house officer both attended to take an account of the cargo. All this shows, very evidently, that the landing was under, and pursuant to, some arrangement made by the consignees, and not by any compulsion ; the consignees, probably, calculating upon their exertions and influence to obtain a relaxation of the decree ; and that it would be better to procure a provisional landing than to send back the cargo at that time, thinking, probably, that this course might be resorted to after every other attempt should fail. For, in their speculations on the result, with respect to cargoes in this situation, they, in their letter of the 11th of *September*, consider them in one of three predicaments ; either to be admitted unconditionally, or under certain restrictions, or to be sent back. And thus we see the reason why no mention is made of an application to re-export the cargo until *April*, 1808 ; all attempts, probably, to effect any thing better, had failed, and this was resorted to as the last alternative. If I were sitting as a juror to weigh the evidence in this cause, and draw inferences from the facts stated, I should be bound to say the weight of evidence is in favor of the conclusion that the cargo was landed voluntarily, under an arrangement between the consignees and the officers of the *French* government, with a view to some future negotiations with the emperor ; and that, of course, the underwriters were not responsible for the loss. But I think, as I suggested upon the argument, that it is a cause which belongs to a jury to decide, and ought to be sent back for that purpose.

SPENCER, J., was of the same opinion.

Judgment for the plaintiff.

NEW-YORK,  
May, 1816.

PAIN  
v.  
PACKARD.

\*PAIN against PACKARD, impleaded with MUNSON.

[ \* 174 ]

THIS was an action of *assumpsit*, on a promissory note made by *Packard & Munson*, in which *Packard* alone was arrested, the other defendant being returned not found. The defendant *Packard* pleaded, 1. *Non-assumpsit*. 2. That he

If an obligee, or holder of a note, who is requested, by the surety, to proceed without delay, and collect

the money of the principal, who is then solvent, neglects to proceed against the principal, who, afterwards, becomes insolvent, the surety will be exonerated. (a)

In an action against *A.* and *B.* on their joint note, payable to *C.*, on demand, *A.* pleaded that he signed the note as surety for *B.*, and requested *C.* to proceed immediately to collect the money of *B.*, who was then solvent ; but *C.* neglected to proceed against *B.* until he had become insolvent, and had absconded, whereby the money, as against *B.*, was lost. On demurrer, this was held to be a good plea in bar of the plaintiff's action against *A.* (b)

(a) Vid. what is said of this principle in *King v. Baldwin*, 2 Johns. Ch. Rep. 554. S. C. in error, 17 Johns. Rep. 384. See also *Fulton v. Matthews*, 15 Johns. Rep. 453. *Hayes v. Ward*, 4 Johns. Ch. Rep. 123. 3 Wheat, 154—158, note.

(b) Vid. *The People v. Russell*, 4 Wendell's Rep. 570. *Niblo v. Clark*, 3 Ibid. 24. *Clark v. Niblo*, 6 Ibid. 236. *Ruggles v. Holden*, 3 Wendell's Rep. 216. *Andrus v. Bealls*, 9 Cow. Rep. 693. *Stone v. Hooper*, Ibid. 154. *Warner v. Beardsley*, 8 Wendell's Rep. 194. *People v. Berner*, infra, 383. *Powel v. Waters*, 17 Johns. Rep. 175. Note (a) to 7 Johns. Rep. 332.

NEW-YORK,  
May, 1816.

PAIN  
v.  
PACKARD.

signed the note, which was for 100 dollars, payable on demand, as surety for *Munson*; that he urged the plaintiff to proceed immediately in collecting the money due on the note from *Munson*, who was then solvent; and that, if the plaintiff had then proceeded immediately to take measures to collect the money of *Munson*, he might have obtained payment from him; but the plaintiff neglected to proceed against *Munson*, until he became insolvent, absconded, and went away out of the state, whereby the plaintiff was unable to collect the money of *Munson*. 3. The third plea was like the second, except that the defendant alleged a promise, on the part of the plaintiff, that he would immediately proceed to collect the money of *Munson*, and a breach of that promise, by which the defendant was deceived and defrauded, and prevented from obtaining the money from *Munson*, &c.

There was a demurrer to the second and third pleas, and a joinder in demurrer, which was submitted to the Court without argument.

*Per Curiam.* The facts set forth in the plea are admitted by the demurrer. The principles laid down in the case of *The People v. Jansen*, (7 *Johns. Rep.* 336.) will warrant and support this plea. We there say, a mere delay in calling on the principal will not discharge the surety. The same principle was fully and explicitly laid down by the Court, in the case of *Tallmadge v. Brush*.† But this is not such a case. Here is a special request, by the surety, to proceed to collect the money from the principal; and an averment of a loss of the money, as against the principal, in consequence of such neglect. The averments and facts stated in the plea are not repugnant, or contradictory to the terms of the note. The suit here is by the payee against the makers. The fact of *Packard* having been security only, is fairly to be presumed to have been known \*to the plaintiff. He was, in law and equity, therefore, bound to use due diligence against the principal, in order to exonerate the surety. This he has not done. There can be no substantial objections against such a plea. It may be said, the surety might have paid the note and prosecuted the principal; but although he might have done so, he was not bound to do it. If he had a right to expedite the plaintiff in proceeding against the principal, and chose to rest on that, he might do so. In the case of the *Trent Nav. Co. v. Harley*, (10 *East*, 34.) the plea was similar to the present, and not demurred to. The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.

NELSON *against* DUBOIS.

IN ERROR, to the Court of Common Pleas of *Orange* county. *Nelson* brought his action in the Court below against *Dubois*. The first count in the declaration was on a promissory note made by the defendant and one *Benjamin Brundige*, dated the 15th of *November*, 1811, whereby they, jointly and severally, promised to pay to the plaintiff, or bearer, 65 dollars, one year after date, for value received. The second count stated, that whereas, in consideration that *Nelson*, at the special instance and request of *Dubois*, would sell and deliver to one *Benjamin Brundige*, on credit, a certain horse, which he had occasion for, *Dubois* undertook, and promised to *Nelson* to be accountable to him for the said horse; and averred that the plaintiff did, then and there, sell, and deliver to *Brundige*, the said horse, at a reasonable price, then and there agreed upon, to wit, the sum of 65 dollars. The third count was, that whereas, on, &c., at, &c., in consideration that the plaintiff would sell and deliver to one *B. Brundige* a certain other horse, which he had occasion for, on a credit of one year, and take his note payable at that time, he, the defendant, undertook and promised to guaranty to the plaintiff the payment of the said note; and the plaintiff averred that, confiding in the promise, &c., of the \*defendant, he did, &c., sell and deliver to the said *B. B.* the said horse, at and for a certain reasonable price, agreed on between them, to wit, the sum of 65 dollars, on a credit of one year, and took his note therefor, payable at the expiration of that time; and though, &c.

The note produced at the trial was signed by *B. Brundige*, payable to the plaintiff, or bearer, for 65 dollars, with interest, and endorsed in blank by the defendant. The plaintiff offered to prove, that *B.*, the maker of the note, on the day it was made, wanted to buy a horse of the plaintiff, which the plaintiff refused to sell him, unless the defendant would become his security; that the defendant, thereupon, agreed to become security for *B.*, and wrote the note himself, and endorsed it, and delivered it to the plaintiff, and said, that he considered himself bound to pay the note, and guarantied the payment of it to the plaintiff; and the horse was then delivered to *B.* It was agreed by the counsel, that the guarantee of the defendant should be considered as filled up, and written up above the signature of the defendant on the note. The plaintiff, also, offered to prove that *B.* was then a minor, and possessed of very little property, and the credit was given to the defendant; and that, after the note became due, it was presented to the defendant, who promised to pay it. This evidence was objected to by the defendant's counsel, and rejected by the Court below, as within the statute

NEW-YORK,  
May, 1816.

NELSON

v.

DUBOIS.

If a promissory note, payable to bearer, or not negotiable, is endorsed in blank, the holder or may write, over the name of the endorser, a guaranty, or promise to pay the note, so as to take the promise out of the statute of frauds; and this may be done at any time before, or at the trial. (a)

Where *A* sold a horse to *B.*, at the request of *C.*, and on his promise to guaranty the payment of *B.*'s note for the

[ \* 176 ] money, and *B.* gave a note payable to *A.*, or bearer, in 12 months, which *C.* endorsed in blank, this was held to be an original undertaking by *C.*, as surety, who was equally responsible as if he had signed the note with *B.*

(a) Vide *Reynolds v. Ward*, 5 *Wendell's Rep.* 501. *Fulton v. Matthews*, 15 *Johns. Rep.* 433. *Turner v. Burrows*, 8 *Wendell's Rep.* 144.

NEW-YORK,  
May, 1816.

NELSON  
v.  
DUBOIS.

† *Leonard v. Vredenburg*, 8 *Johns. Rep.* 29.  
*Bailey & Bogert v. Freeman*, 11 *Johns. Rep.* 221.

‡ *Doug.* 514.  
*Herrick v. Carman*, 12 *Johns. Rep.* 160. 3  
*Mass. Rep.* 274.  
5 *Mass. Rep.* 358.

[ \* 177 ]

of frauds, on which the plaintiff became nonsuited, and tendered a bill of exceptions to the opinion of the Court.

*Ross*, for the plaintiff in error, contended, that the evidence offered by the plaintiff ought to have been received; that the promise of the defendant was an original undertaking, and not within the statute of frauds.† The endorsement in blank, by the defendant, authorized the plaintiff to write, over his name, a promise to pay, or a guarantee. It is a letter of credit.‡ This may be done at the trial; and it made no difference whether the note was negotiable or not. The endorsement is equivalent to a new drawing.

*Story*, contra, insisted that, though there was a consideration, there must be a promise, in writing, at the time; that the promise, or guarantee, must be written by the endorser, at the time, to take it out of the statute. It is not competent for the plaintiff \*to fill up the blank, at the trial, for that purpose. Parol evidence is inadmissible to prove the guarantee.

SPENCER, J., delivered the opinion of the Court. Under the third count in the declaration, the evidence offered was admissible, unless, indeed, the promise is within the statute of frauds. A declaration may count, as on a promise by parol, and it may be supported by a promise in writing, if it comport with the promise stated.

Since the cases of *Leonard v. Vredenburg*, (8 *Johns. Rep.* 29.) and *Bailey & Bogert v. Freeman*, (11 *Johns. Rep.* 221.) it cannot be questioned that there was a consideration for the defendant's promise. The case, then, turns on this point, Was the promise within the statute of frauds?

If what was said by me, in delivering the opinion of the Court in the case of *Herrick v. Carman*, (12 *Johns. Rep.* 160.) be law, then the decision of the Court below was erroneous. Although what was then said was deemed pertinent to that case, it may not have been necessary to the decision of the cause; and this Court, therefore, are not to be considered as compromised by it. The facts, in that case, are the same as in this, with the difference only, that it did not appear that *Herrick* endorsed the note for the purpose of giving *Ryan*, the maker of the note, credit with *Lawrence, Carman, & Co.* It was then, and still is, my opinion, that, had he done so, he would have been liable to them or any subsequent endorsee, and that *Herrick's* endorsement might have been converted into a guarantee to pay the note, if *Ryan* did not. In the present case, it does appear, clear and affirmatively, that the plaintiff refused to sell the horse, for which the note was given on *Brundige's* responsibility, and that the defendant put his name on the note as guarantee for *Brundige's* payment of it, when it fell due; and that, but for the defendant's undertaking, as guarantee, the plaintiff would not have parted with his property.

In saying what I did, in *Herrick* and *Carman*, I reposed myself, principally, on the cases of *Josselyn v. Ames* (3 Mass. Rep. 274.) and *Bishop v. Hayward*, (4 T. R. 470.) In the former of these cases, the plaintiff sued on a note of hand not negotiable, given by *John Ames*, and payable to defendant; and it was averred, that the defendant had guarantied the payment \*of the note to the plaintiff. The facts were, that *John Ames* was indebted to the plaintiff upon a note, and, on demand of security, he offered *Oliver Ames* as security; the old note was given up, and a new one taken, made payable by *John* to *Oliver*, and upon which *Oliver* endorsed his name in blank. The Court held, that the plaintiff might write an undertaking by *Oliver*, to pay the note, above his name, and then might maintain his action.

In *Bishop* and *Hayward*, Lord *Kenyon* admits, that, in a suit by a prior endorser against a subsequent one, a case might happen in which the plaintiff might recover, if his name were used for form only, and the note, though nominally payable to the plaintiff, was substantially to be paid to the defendant.

The case of *Hunt v. Adams* (5 Mass. Rep. 358.) bears strong analogy to this case. There, one *Chaplin* gave a note to the plaintiff's intestate, for 1,500 dollars. The defendant signed, underneath the note, an acknowledgment that he was holden as surety for the payment of the note. It was objected, that it was a collateral undertaking to pay the debt of another. *Parsons*, Ch. J., with the concurrence of the other judges, held, that the defendant was an original party to the contract, *Chaplin* as principal, and the defendant as surety. He relied on the fact, that the signatures of the promisers were made at the same time, and that, in effect, it was the note of both; and that the consideration to the surety was the credit given to the principal by the promisee.

The case of *White v. Howland* (9 Mass. Rep. 314.) is expressly in point. In that case, one *Taber* gave a note to the plaintiff for 250 dollars, payable on demand. On the back of it was a promise, by *Coggeshall* and the defendant, jointly and severally, to pay the note to *White*. It appeared, that the amount was loaned by the plaintiff to *Taber*, on his agreeing to give his note with two endorsers; and that the note was given with that intent, but made payable to *White* instead of *Coggeshall*, the first endorser. The Court held, that the plaintiff was entitled to recover, and that the effect of the defendant's signature was the same as if he had subscribed the note on the face of it, as surety; and that he was answerable as an original promiser, equally with *Taber*. It is evident that the promise was filled up over the names of the endorsers. In *Russell v. Langstaffe*, (Doug. 514.) Lord *Mansfield* held, that the endorsement \*of a name on checks, in blanks, without sum, date, or time of payment being mentioned in the body of the notes, was a letter of credit for an indefinite sum. In *Collins v. Emmett*,

NEW-YORK,  
May, 1816.

NELSON  
v.  
DUBOIS.

[ \* 178 ]

[ \* 179 ]

NEW-YORK,  
May, 1816.

SHAW  
v.  
WHITE

(1 *Hen. Bl. Rep.* 313.) Lord *Loughborough* held, that signing a party's name to a blank paper, and delivering it to *B.* to draw a bill of exchange, for such sum, payable at such time, and to such person as *B.* should think fit, was a binding instrument.

In the case of *Violet* and *Patton*, (5 *Cranch's Rep.* 151.) circumstanced very much like the one before us, Ch. J. *Marshall*, in delivering the opinion of the Court, which appears to have been unanimous, said, the paper was endorsed with the intent that a promissory note should be written on the other side, and that he should be considered the endorser of that note; and he is now concluded from saying or proving that it was not filled up when he endorsed it; it would be to protect himself from the effect of his promise, by alleging a fraudulent combination between himself and another; and, in that case, the exception was taken, that the statute of frauds and perjuries avoided the agreement, but the Court held it did not.

I confess I do not perceive that this case is at all within the statute; the defendant's promise is not to pay on the default of *Brundige*, but is an original undertaking as surety; and the defendant is as much holden as if he had signed the body of the note.

VAN NESS, J., dissented.

Judgment reversed, and cause remitted, &c.

### SHAW, widow, against WHITE.

The widow is entitled to dower in lands aliened by the husband during the coverture, to one third of the value of the lands at the time of alienation. (a)  
[ \* 180 ]

**DOWER** for lands, in *Granville*, in *Washington* county. The husband of the demandant, being seised in fee of about 2,000 acres of land in *G.*, sold and conveyed them, in fee, in 1765, to *John Lake*, under whom the defendant acquired a regular title in fee. The husband died within two years after the deed to *Lake*, leaving the demandant, his widow. At the time \*of the conveyance, the premises were new lands, and unimproved, but have been since highly improved and cultivated by the defendant.

The questions raised for the consideration of the Court, and submitted on the case, without argument, were, 1. Whether, and what, the demandant is entitled to recover; 2. How the recovery is to be regulated in relation to the improved value of the premises.

*Per Curiam.* The rule by which the recovery, in this case, is to be regulated, will be found laid down in the cases of *Humphrey v. Phinny*, (2 *Johns. Rep.* 484., and *Dorchester v. Coventry*, (11 *Johns. Rep.* 512.) The case is rather obscure as to the precise question submitted to the Court. There can be no doubt the demandant is entitled to recover; and, under the

(a) *Dolf v. Basset*, 15 *Johns. Rep.* 21. *Coates v. Cheever*, 1 *Cowen*, 460.

statute relativ to such cases, (1 *N. R. L.* 60.) (a) that recovery must be one third of the premises, in value, as at the time of the conveyance by the husband. The widow does not have the benefit of the improvements, or of the increased value or appreciation of the land. The value, as is suggested by the Court, in *Humphrey v. Phinny*, must be ascertained, either by the sheriff on the writ of seisin, or by a writ of inquiry, founded on proper suggestions. The demandant must, accordingly, have judgment for one third of the premises, in value, as they were at the time of the alienation by her husband.

Judgment accordingly.

(a) 1 *R. S.* 740.

NEW-YORK,  
May, 1816.

JACKSON  
V.  
LEONARD.

JACKSON, *ex dem.* POTTER, against LEONARD and others.

**EJECTMENT** for lot No. 88., in *Manlius*, tried before Mr. Justice *Van Ness*, at the *Onondaga* circuit, in *June*, 1815. A verdict was taken for the plaintiff, subject to the opinion of the \*Court, on a case containing the following facts: Both parties claimed under *Lebbeus Foster*; the plaintiff, under a mortgage from *Foster* to the lessor of the plaintiff, dated the 14th of *March*, 1806, for securing the payment of 1,000 dollars lent, in which it was expressly agreed that, for the use of that sum, *Potter* should have the use of the premises for two years; and if the money was not paid at that time, *Potter* was to keep possession until it was paid, and have the use of the premises for the use of the money. To the execution of this mortgage *Charles B. Bristol* was a subscribing witness. The mortgage was not registered.

The defendant gave in evidence an absolute deed, with warranty, from *Foster* to *Leonard*, dated the 20th of *January*, 1808, and duly recorded on the day of its date.

*Charles B. Bristol*, who had been discharged under the insolvent act, was sworn as a witness for the defendant. He testified that he made the purchase of the premises of *Foster*, in the name of *Leonard*, and for his benefit, for 2,000 dollars; that, previous to the purchase, *Leonard* viewed the lot, while *Potter* was in possession. The witness stated to *Foster* that *Leonard* had sent, by him, the 2,000 dollars for the land, and he paid *Foster* 1,000 dollars, and gave a bond conditioned to pay 1,000 dollars, due on the mortgage to *Potter*, who was then in possession of the premises; retaining the other 1,000 dollars, which was unknown to *Leonard*. The reason assigned for retaining the 1,000 dollars, by the witness, was, that he was in treaty with *Potter* for the sale of 300 acres of land in *Pompey*, at 9 dollars per acre; being part of 600 acres which the witness had con-

*L.*, having, by his agent, *B.*, agreed to purchase a farm of

[ \* 181 ]  
*F.* for 2,000 dollars, advanced the money to *B.*, for the purpose of completing the purchase; and *B.* paid to *F.* 1,000 dollars, and gave his bond to *F.* to pay off a prior mortgage, for the like sum, to *P.*, retaining the 1,000 dollars unknown to *L.* *Held*, that though *P.* knew of *B.*'s retaining the 1,000 dollars, instead of paying off the mortgage, and had agreed with *B.* that the mortgage should be paid by land, for the purchase of which he had entered into an agreement with *B.*, which agreement, however, was not performed by *B.*; yet his title under the mortgage was not affected by the arrangement, there being no fraud on his agent

part; but that *L.* must bear the loss arising from the misconduct of his own agent

NEW-YORK,  
May, 1816.

JACKSON  
V.  
LEONARD.

tracted to purchase of *James Sackett*; and *Potter* proposed that the 1,000 dollars, due from *Foster*, should be applied towards the first payment for the land in *Pompey*, which was, accordingly, agreed to be done. *Potter* removed from the premises, and went into possession of the land in *Pompey*; and the witness took possession of the premises for *Leonard*. The agreement was not in writing, though intended to be so. *Potter* was to discharge the mortgage. The witness was unable to fulfil his contract with *Sackett*, and gave it up, relinquishing what he had paid, about 350 dollars, at the instance of *Potter*, who said he could make another contract with *Sackett*; and it was not until after he had made a contract with *Sackett* that *Potter* said any thing about the mortgage money.

[ \* 182 ]

\**Foster*, also, was a witness for the defendant, and testified, that he made the contract for the sale of the land to *Leonard*, with *Bristol*, for 2,000 dollars, and executed the deed to *Leonard*. That *Bristol* paid 1,000 dollars in cash, and gave his bond, conditioned to pay *Potter* the amount of the mortgage, and to indemnify the witness against it; that it was in consequence of the advice and request of *Potter* that he took the bond. *Potter* told him that he was about making a purchase from *Bristol* of land in *Pompey*, and in that way he was to be paid the 1,000 dollars, and the witness to be discharged from it. That, not long since, he was surprised by being told by *Potter*, that something had taken place between him and *Bristol*, in consequence of which he should have to come back to the witness for the 1,000 dollars.

*Randall*, for the plaintiff, contended, 1. That *Bristol*, the agent, having notice of the mortgage to *Potter*, it must be deemed equivalent as notice to *Leonard*, his principal.† And having such notice of the existence of the prior mortgage, he is equally bound as if the mortgage had been duly registered.‡

2. That parol evidence of a discharge of the mortgage was inadmissible. A fee cannot be conveyed, or transferred, unless by an instrument under seal.§ There can be no implied surrender without a consideration.|| And nothing appears to have passed between the parties.

*Van Vechten*, contra. That the agreement was not reduced to writing was the fault of *Bristol* and *Potter*. Their neglect to reduce it to writing must be considered collusive and fraudulent, as it respects *Leonard*. If the agreement had been in writing, it will not be pretended that the parties would not have been bound; and shall they be permitted to object to their own fraudulent neglect? Can this agreement be void, as it regards third persons who are to be affected by it? Will not the Court consider that as done which ought to have been done?

Again; here was a part performance of the contract, which takes it out of the statute. *Potter* went into possession of the land in *Pompey*, under the agreement, which was so far execu-

† 4 *Cruise's*  
*Dig.* 353. 362.  
9 *Johns. Rep.*  
163. *Sugden's*  
*Law of Vend.*  
498. 2 *Ves.* 440.

‡ 10 *Johns.*  
*Rep.* 457. 460.  
4 *Dallas*, 145.

§ 2 *Johns.*  
*Rep.* 430. 12  
*Johns. Rep.* 76.

|| *Burr.* 1980.  
1 *Wm. Bl.* 617.  
*Burr. Rep.* 211.



ted as to render the payment complete. How can it be said that *Potter* received no consideration? *Leonard* furnished the money to pay off the mortgage. *Potter* was to remain in possession, in lieu of receiving the interest; and when the mortgage was paid off, he was to give up the possession. He did deliver up the possession to *Bristol* for the use of *Leonard*; and the inference is irresistible, that the mortgage was paid. A mortgage may be discharged by parol.† Suppose it had been given up; the possession by the mortgagor is, *prima facie*, evidence of the mortgage having been paid. That a certificate of the payment is necessary to cancel the registry, is quite a different thing. As it respected the rights of the parties, the mortgage was discharged.

NEW-YORK.  
May, 1816.

JACKSON  
V.  
LEONARD.

[ \* 183 ]

† 2 Burr. 978,  
979. 11 Johns.  
Rep. 538.

SPENCER, J., delivered the opinion of the Court. No objection has been made to the non-registry of the mortgage, and it would have been unavailing; for *Bristol*, the agent of *Leonard*, in taking the deed and making the purchase, had full notice of the mortgage; and this was full notice to *Leonard*.

The legal title is manifestly in the lessor of the plaintiffs; and it must prevail, unless he has done some act which precludes him from resting on his mortgage. It has been urged, that *Potter's* agreement with *Bristol*, that the 1,000 dollars advanced by *Leonard* to *Bristol*, for the purpose of discharging the mortgage, should be retained by *Bristol*, and that the amount due on the mortgage should be paid by *Bristol*, by the contemplated conveyance by *Bristol* to *Potter*, of land contracted for with *Sackett*, was such an interference on the part of *Potter*, and operated so injuriously and fraudulently towards *Leonard*, that *Potter* cannot now insist on his mortgage.

It cannot be doubted, that, in consequence of *Bristol's* appropriating, to his own use, the 1,000 dollars placed in his hands by *Leonard*, to pay off the mortgage, the latter has been defrauded of that amount; but the question still returns, Who has been the culpable cause of the loss? I cannot perceive that *Potter* is chargeable with any direct or constructive fraud. He knew, indeed, that *Leonard* had sent to *Bristol* 2,000 dollars; half of which was to be paid to *Foster*, for his right to the equity of redemption, and the other half in discharge of the mortgage. The agreement between *Potter* and *Bristol* may have operated to prevent the latter from paying off the mortgage; but it does not appear that *Potter* expressly agreed that *Bristol* should retain the 1,000 dollars intended to be applied to the payment of the mortgage, nor does it appear that *Potter* knew that this retainer was concealed from *Leonard*.

\*The fact is, that the injury to *Leonard* is entirely attributable to the conduct of his own agent, *Bristol*: and it would be unjust that this loss should be sustained by *Potter*, whose conduct appears to have been fair, candid, and upright.

If it could be made out, that *Potter* derived some benefit from

[ \* 184 ]

NEW-YORK,  
May, 1816.

M'LEAN  
v.  
HUGARIN.

*Bristol's* renouncing his contract with *Sackett*, it does not occur to me that the defendants can avail themselves of that to invalidate *Potter's* mortgage. Nothing can produce that effect but a direct and positive fraud on the part of *Potter*, or an actual payment of the mortgage. Of the latter there is no pretence, and I see no evidence to warrant us in saying that *Potter* has been guilty of such a fraud as to be estopped from setting up his mortgage.

It is very questionable whether *Potter* derived any benefit from the contract between *Sackett* and *Bristol*. *Sackett* testifies, that he made no agreement with *Potter*, nor made him any offer of the land, before *Bristol* relinquished his contract.

There is nothing that can affect *Potter's* right under his mortgage.

Judgment for the plaintiff.

### M'LEAN against HUGARIN.

Where an improper set-off has been admitted in a cause in a justice's Court, and tried, the record, in such former action, is a bar to an action brought on the subject of such set-off. (a)

Parol evidence is inadmissible to contradict the certificate of a justice as to the

[ \* 185 ]

proceedings in a cause before him. (b)

Where the return to a *certiorari* stated the certificate of a justice of a former trial, authenticated according to the act, but not appearing to be under the seal of the C. P., otherwise than that the clerk had stated,

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error, who was plaintiff in the Court below, brought an action of trover, to recover the value of a spinning-wheel. The defendant pleaded the general issue, and a former action for the same cause, in which the present plaintiff, being defendant, set off the present demand, which was tried in that action.

The certificate of the justice, of the proceedings on the former trial, (authenticated according to the act, except that it does not appear that the clerk affixed the seal of the C. P., but it is only stated, "*Witness my hand and seal*,") being produced, the plaintiff below offered testimony to show that the demand for the spinning-wheel was withdrawn, and not submitted to the justice: this evidence being admitted, and the fact being proved, the justice gave judgment for the plaintiff below.

*Per Curiam*. The certificate of the former trial between these parties was sufficiently authenticated. It is necessarily to be inferred that it was, in fact, as it purports to have been, under seal, as required by the statute: at all events, no objection was made to its admission upon the trial; and it cannot, now, be called in question. Although the demand, in this case, sounds in *tort*, and might not, in strictness, have been admissible as a set-off on the former trial, yet if it were admitted without objection, and has been once tried, that judgment is conclusive with respect to this matter; and the only question is, whether

"*Witness my hand and seal*," it was held, that it was to be inferred that it was under seal.

(a) Vide *Lawrence v. Houghton*, 5 *Johns. Rep.* 129, and the cases in note (b.)

(b) Vide *Savacool v. Broughton*, 5 *Wendell's Rep.* 170. *Saeding v. Whitney*, 3 *Ibid.* 154. *Curtis v. Groat*, 6 *Johns. Rep.* 168. *Wilson v. Larmouth*, 3 *Ibid.* 433. *King v. Fuller*, 3 *Caines*, 152. *Sherwood v. Johnson*, 1 *Wendell's Rep.* 443.

testimony was admissible to contradict the justice's certificate of the former trial. This certificate clearly shows, that this same matter has once been tried.

The act authorizing the giving of such certificate, (1 R. L. 393. s. 21.) declares, that it shall be good and legal evidence to prove the facts contained in such exemplifications. In the case of *White and Hall v. Hawn*, (5 Johns. Rep. 351.) this Court decided that parol evidence of a former trial was inadmissible. In *Posson v. Brown*, (11 Johns. Rep. 166.) the same principle was recognized; and it was there said, that, although the proceedings and judgment before a justice may not be technically a record, yet the material parts are in writing, and ought to be produced; that parol evidence was not the highest and best evidence; that the statute directing the manner in which such proceedings are to be authenticated, seems to regard them in the nature of a record. If, then, as has been settled by this Court, parol evidence is inadmissible to prove the proceedings of a former trial, it must follow, as a necessary consequence, that such evidence is not admissible to contradict the written evidence of such proceedings. The judgment must, therefore, be reversed.

Judgment reversed.

NEW-YORK,  
May, 1816.

JOHNSON  
v.

HUNT

not primary  
an here in  
Cal.

### \*JOHNSON against HUNT.

[ \* 186 ]

IN ERROR, on a *certiorari* to a justice's Court.

*Hunt*, the plaintiff in the Court below, brought an action against the defendant below, the present plaintiff in error, as president of a court-martial, to recover back a fine of five dollars, which had been imposed upon, and collected of, the plaintiff below, as a delinquent. The plaintiff, when he appeared before the court-martial, claimed an exemption, as being a contractor to carry the military express mail from *Canandaigua* to *Batavia*, but he was not employed in the actual transportation. The person who warned the plaintiff to attend parade, and appear before the court-martial, had never received any warrant, or power, from the commandant of the regiment, to act as sergeant. This objection was not made before the court-martial, the plaintiff being ignorant of the fact. The justice gave judgment for the plaintiff below.

*Per Curiam.* The plaintiff below being a contractor for carrying the mail, did not exempt him from military duty. The exemption in the act, (sess. 32. c. 145. s. 2.) of all stage drivers who are employed in the care and conveyance of the mail, &c., evidently extends to the actual carriers of the mail only. The objection that the sergeant, who warned the plaintiff below to appear on the parade, and before the court-martial, was

A contractor for carrying the mail is not exempt from militia duty. The exemption extends only to persons engaged in the actual conveyance of it.

In an action against the president of a court-martial, to recover back a fine, the objection cannot be made, that the person who warned the plaintiff to appear on parade, and before the court-martial, was not duly appointed a sergeant, even if the objection could be taken before the court-martial.

NEW-YORK,  
May, 1816.

BATTEY  
v.  
BUTTON.

not regularly and duly appointed, cannot be made here. If it could have been made at all, it should have been made before the court-martial. The plaintiff, having appeared before the court-martial, must be deemed to have waived any irregularity in the summons. The sergeant was an officer, *de facto*, and, so far as strangers are concerned, his acts must be deemed valid.

Judgment reversed.

[ \*187 ]

\*BATTEY against BUTTON.

Where, on a submission to arbitration, the parties mutually execute promissory notes to one another, as security for the payment of the sum which may be awarded, and the arbitrators, having awarded in favor of A., the one party, deliver to him the note of B., the other party, and A. endorses the note to C., to whom B. is compelled to pay the amount, and B. seeks to recover back from A. the sum so paid to his endorsee, on the ground that the award was void; B. cannot recover against A.: if he could have insisted on the invalidity of the note, as a defence to an action by C., or if such defence were then inadmissible, he must show, that he could not have availed himself of it, by averring that the note was transferred before it fell due.

Where, on a submission to three arbitrators, one dissents from the award of the other two, who execute the award without the dissenting arbitrator, such award is valid.

THIS was an action of *assumpsit*. The first count of the declaration stated, that one *Henry Osborn* had been sued, and arrested by virtue of a warrant issued by one *Henry Delord*, a justice of the peace of the county of *Clinton*, at the suit of the defendant; in which suit the defendant claimed the sum of eight dollars, whereupon the plaintiff, as the agent of *Osborn*, and the defendant, agreed to submit the matter in controversy to the decision of *Henry Delord* and *Henry Grun*; and, in case they could not agree, after due examination and consultation in the premises, that then they should choose a third person to arbitrate in conjunction with them, in the premises, whereupon they chose *William Stewart*, and the parties, *Battey* and *Button*, mutually executed, each to the other, a note dated at *Peru*, the 6th of *February*, 1808, for the sum of 250 dollars, payable to each other or order, with interest, two months after date; and it was agreed, that, in case the arbitrators should make an award against either party, the note executed by such party should be endorsed by the arbitrators, so as to leave due thereon the sum which they should award such party to pay the other; and the note executed by the party in whose favor the award should be made be delivered up and cancelled; that the arbitrators having met and heard the proofs, two of them, *Grun* and *Stewart*, awarded against the said *Henry Osborn* the sum of 232 dollars and 75 cents, and thereupon endorsed upon the note executed by *Battey* the sum of 17 dollars and 25 cents; that *Delord*, the third arbitrator, dissented from the award; and that the defendant, afterwards, endorsed the said note to *Ross & Platt*, to whom the plaintiff was compelled to pay the said 232 dollars and 75 cents, with interest.

To this was added a count for money lent, money paid, and money had and received.

The defendant demurred, specially, to the first count in the plaintiff's declaration, and the plaintiff joined in demurrer.

*Crary*, in support of the demurrer.

\**Z. R. Shepherd, contra.*

*Per Curiam.* This case comes before the Court on a special demurrer to the first count in the declaration. It is unnecessary, however, to notice the special causes of demurrer, for the count is bad in substance. If the arbitration note, which the plaintiff had paid to the defendant, was void, payment of it should have been resisted, if the defence was admissible, and, if not, the declaration, in this case, should show why it was not. It was, therefore, a material averment, *that the note was transferred before it fell due*, so as to show that the defence could not have been then set up against the note in the hands of an innocent endorsee, to whom it was transferred before it fell due.

But the objection taken to the validity of the note is not well founded; to wit, that the award between *Button* and *Osborn* was void, because not signed by all the arbitrators. This was not necessary. The submission was to two, and, in case they could not agree, they were to choose a third person to arbitrate, in conjunction with them, upon the premises. The declaration alleges that such third person was chosen. This mode of submission necessarily implies an authority to two, to make an award. To require the award to be signed by all, would involve a manifest absurdity. The two were authorized to choose a third only in case of their disagreement; and yet, after they had disagreed, and chosen a third, all must agree, according to the argument on the part of the plaintiff. The first count in the declaration is, therefore, bad on this ground, which strikes at the root of the plaintiff's cause of action. The defendant must, accordingly, have judgment upon the demurrer.

NEW-YORK.  
May, 1816.

GALE  
V.  
O'BRIAN.

\*GALE and STANLEY *against* O'BRIAN.

[ \* 189 ]

THIS was an action on a bond in the penalty of 1,000 dollars, conditioned for the performance of a covenant therein contained. The declaration commenced by demanding 1,000 dollars, which the defendant owed to, and unjustly detained from, the plaintiffs: it then set forth the penalty of the bond, with the condition, in which the defendant's covenant was contained; and, having assigned breaches of the covenant, concluded thus: "Therefore, the said *Thomas O'Brian* his covenant with the said *James Gale* and *Ashbel Stanley* hath not kept, although often requested so to do, but has broken the same; wherefore the said *James Gale* and *Ashbel Stanley* say, they are injured, and sustained damages to the value of 1,000 dollars, and therefore they bring suit," &c.

To this declaration there was a general demurrer and joinder in demurrer. The cause was submitted to the Court without argument, at a former term, *May, 1815*, (12 *Johns. Rep.* 216.) and judgment was given for the plaintiff.

VOL. XIII.

21

161

A declaration on a bond, conditioned for the performance of covenants, commencing in debt, after setting forth the condition, and assigning breaches, and concluding as in covenant, and with demanding damages, is, it seems, good on special demurrer.

But it is certainly good on a general demurrer. Vide 12 *Johns. Rep.* 216. S. C.

NEW-YORK,  
May, 1816.

GALE

v.  
O'BRIAN.

By consent of parties, the cause was again brought before the Court, and argued by *Cantine*, in support of the demurrer, and *Powers*, for the plaintiff.

*Cantine* contended that the judgment ought to be in debt, but no judgment in debt could be given on this declaration: it must be in covenant, and this is a good ground for a general demurrer. The attorney of the plaintiff, in drawing the declaration, appears to have followed the precedent in *2 Chitty on Pleadings*, 154., except the conclusion, which, in that precedent, is in *debt* instead of *covenant*.

This is a misjoinder, which renders the declaration bad in substance.†

† 1 *Chitty's*  
l. 206. 2 *Bos.*  
\* *Pull.* 22A.

*Powers*, contra. The Court (12 *Johns. Rep.* 216.) have already decided the very point. The objection is matter of form, and can only be taken advantage of, if at all, by a *special* demurrer. By the 7th section of the act for the amendment of the law,† the Court, in cases of demurrer, are required to give judgment according to the right of the matter, without regard to form, unless the particular defect be shown, specially, as the cause of demurrer.

[ \* 190 ]  
† 1 *N. R. L.*  
120.

Sergeant *Williams*, in his note, (5) to 2 *Saunders*, 190, says, expressly, that a wrong conclusion to a declaration is not matter of substance, but mere form, and must be specially shown for cause of demurrer. The declaration is in the form recommended by *Williams*, in his note (1) to 1 *Saund.* 68.; it sets forth the bond and the condition, and then assigns the breaches, concluding in *covenant*.§ If the conclusion be wrong, it is like a title defectively set forth, which is only a fault in form.||

§ *Hob.* 233. 6  
*Johns. Rep.* 67.  
|| 1 *Tidd's Pr.*  
547.

*Cantine*, in reply. Sergeant *Williams*, in his note to 2 *Saund.* 187. c., corrects his mistake, in the note referred to in 1 *Saund.* 58., in saying that the declaration might conclude as in *covenant*; and the Court, in giving judgment on the demurrer, in this cause, in 12 *Johns. Rep.* 216., did not advert to this correction, but relied on the authority of *Williams*, in his first note.

*Per Curiam.* This case has now been argued, and we find no reasons to induce a change of opinion from that formerly given, when the case was submitted without argument. (12 *Johns. Rep.* 216.) The Court did not then advert to the second note to 2 *Saund.* 187.: in that note Mr. *Williams* corrects what he had said in his note to 1 *Saund.* 58., and he seems to think that the conclusion of the declaration in *covenant*, after an assignment of breaches, is incorrect. We agree that it is not a neat technical conclusion; but it does not follow that it furnishes a cause of demurrer. Nothing short of a special demurrer can reach the supposed imperfection in the conclusion of the declaration; for, certainly, it is not matter of substance; and, we think, even a special demurrer would not avail.

The declaration is in debt. It demands the penalty of the

bond in the *debet et detinet*, and it sets out the bond truly, and after setting forth the condition, it avers a breach of the covenants. Legally and technically speaking, the stipulations in the condition are covenants, on which an action of covenant might have been brought; but calling those stipulations covenants did not render the action an action of covenant; its quality had been fixed before, by demanding the penalty as a debt, in the usual way.

NEW-YORK.  
May, 1916.

PIERCE  
v.  
SHELDON.

[\* 191]

Judgment for the plaintiff.

### PIERCE against SHELDON.

IN ERROR, on *certiorari* to a justice's Court.

This was an action of trespass on the case, brought by *Sheldon*, the plaintiff below, against *Pierce*, a constable, for the amount of an execution delivered to him to be served, and which he had neglected to serve, or return, within the time limited. The defendant below insisted that the proper form of action was *debt*, and that the justice had no right to try the cause, because he was the father-in-law of the plaintiff. Both these objections were overruled, and judgment was given for the plaintiff below.

Whether it is a valid objection to a justice of the peace trying a cause, that one of the parties is his son-in-law? *Quære.* (a)

An action against a constable, for not serving or returning an execution in a justice's Court, must be debt; if the action be brought in any other form, the judgment will be reversed.

*Per Curiam.* Whether the justice was legally *disqualified*, on the ground that the plaintiff below was his son-in-law, is, perhaps, questionable; but the gross indecency of an exercise of his judicial power, in such a case, should induce this Court to scrutinize his proceedings with a jealous eye.

This suit was brought under the 13th section of the 25 dollar act, (1 R. L. 395.) (b) which provides a remedy, expressly, "by action of debt." The objection to the form of action was, therefore, well taken, and the judgment ought to be reversed.

Judgment reversed.

(a) That the justice before whom a suit was brought, was the son-in-law of the plaintiff, and persisted to hear and decide the cause notwithstanding the defendant objected to his jurisdiction on the ground of his relationship to the plaintiff, is, of itself, evidence that the trial was not fair and impartial, and sufficient ground for reversing the judgment when the damages given are excessive. *Bellows v. Pearson*, 19 Johns. Rep. 172. Vide *Eggleston v. Smiley*, 17 Id. 133.

(b) 2 R. L. 253.

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC-  
UTORS.

\*PAWLING, and EUNICE, his wife, late Eunice Stanton  
against WILLSON & SMITH, executors of BIRD.

THIS was an action of *debt*, on a judgment recovered in the Superior Court of the state of *Connecticut*, by *Eunice Stanton*, before her marriage with the plaintiff, *Pawling*, against the defendants, executors of *John Bird*, deceased. The defendants pleaded *non detinet*, accompanied with notice that they intended to insist upon the statute of limitations, in bar of the plaintiff's action. The cause was tried at the *Albany* circuit, in *April*, 1815, before Mr. J. Platt.

A judgment of a Court in another state is to be considered as a foreign judgment, in every respect except in the mode of proving it, and is only *prima facie* evidence of a debt. (a)

And such judgment, when founded on proceedings by attachment against the goods of the defendant, be not being within the jurisdiction of such state, is not even *prima facie* evidence of a debt.

A divorce of persons domiciled in this state, decreed in another state, is invalid here. (b)

But if the parties, although domiciled here, were married in the state in which the divorce was decreed, whether it might not, under those circumstances, be valid? *Quære*.

But, admitting such decree to be valid, if it

[ \* 193 ]  
made no provision with regard to the children of the marriage, and there was no agreement between the parties as to their maintenance, the mother cannot, (the guardianship of the children having been decreed to her,) it seems, support an action against the father for their maintenance: she can, at most, sue him for *contribution* only.

On the trial, the plaintiffs produced, in evidence, a record of a judgment in *Connecticut*, duly authenticated, and commencing with the writ, in which was included the declaration, as follows:

"To the sheriff of the county of *Litchfield*, &c. &c. &c. By authority of the state of *Connecticut*, you are hereby commanded to summon *Ebenezer Willson*, and *Benjamin Smith*, both absent and absconding debtors, out of this state, to parts unknown to the plaintiff, executors of the last will and testament of *John Bird*, Esq., late of *Troy*, in the county of *Rensselaer*, and state of *New-York*, deceased, to appear before the Court of Common Pleas, to be holden at *Litchfield*, within and for the county of *Litchfield*, aforesaid, on the fourth *Tuesday* of *September*, A. D. 1807, then and there to answer unto *Eunice Stanton*, of *Colchester*, in the county of *Chittenden*, and state of *Vermont*, in a plea, that to the plaintiff, the defendants, in said capacity, render the sum of nine hundred dollars, which, to the plaintiff, the said *John*, deceased, while in life, justly owed, by book, to balance book accounts, as by the plaintiff's book, ready in Court to be produced, fully appears; which debt the defendants have never paid, though often requested and demanded, which is to the damage of the plaintiff the sum of one thousand dollars, and for the recovery thereof, with just costs, the plaintiff brings this suit.

"Hereof fail not, and of this writ, and of your doings thereon, make due return according to law. And you are, at least fourteen days before the sitting of said Court, to leave a true and attested copy of this writ with *Uriel Holmes*, Esq., of \*said *Hartland*, and a like copy with *Uriel Holmes*, Jun., Esq., of said *Litchfield*, who are debtors to the defendants, in their said capacity; and, also, a like copy with *Seth P. Beers*, Esq., of said

(a) Vide *Elmendorf v. Harris*, 5 *Wendell's Rep.* 516. *Lawrence v. Knies*, 10 *Johns. Rep.* 140. *Shumway v. Stillman*, 6 *Wendell's Rep.* 447. *Smith v. Mumford*, 9 *Cowen's Rep.* 26. *Francis v. The Ocean Ins. Company*, 6 *Ibid.* 404. *Shumway v. Stillman*, 4 *Cow. Rep.* 292; and see also the cases collected in note (a) to *Robinson v. Ward's Executors*, 8 *Johns. Rep.* 86.

(b) Vide *Jackson v. Jackson*, 1 *Johns. Rep.* 424. *Borden v. Fitch*, 15 *Johns. Rep.* 121. *Bigelow v. Stearns*, 19 *Johns. Rep.* 40.



*Litchfield*, who is both debtor and attorney to the defendants, in their said capacity.

"Dated at *Litchfield*, the 2d day of *April*, A. D. 1807."

*Seth P. Beers* appeared for the defendants, and pleaded, and judgment having been given in the Court of Common Pleas of *Litchfield* county, for the defendants, on a demurrer to the plaintiff's declaration; and the cause being removed, by appeal, into the Supreme Court for the county of *Litchfield*, an issue of fact being joined, a verdict was found for the plaintiff, and judgment was thereupon rendered, that "the plaintiff shall recover, of the goods and estate of the said *John Bird*, deceased, in the hands of his executors, the said sum of six hundred and seventeen dollars and twenty-one cents, damages, and her costs of suit, taxed at thirty-five dollars and sixty-five cents, and that the execution may issue accordingly."

The plaintiffs proved, that, after the recovery of the above judgment, and before the commencement of the present suit, *Eunice Stanton* intermarried with the plaintiff *Pawling*. The plaintiffs further proved, that, about two years previous to the trial, *Smith*, one of the defendants, conversed with the witness, *R. M. Livingston*, respecting the judgments recovered by Mrs. *Pawling* in *Connecticut*, and stated, that, since the marriage of the plaintiffs, *Pawling* had called on him, *Smith*, for payment, and that he was willing to pay, but was apprehensive that it would not protect him in case there should be a failure of assets; that it had been proposed to arbitrate, but he had, for the same reason, declined it; an amicable suit was proposed, as the witness understood: the witness further testified, that *Smith* appeared anxious to make payment, but for the reason assigned; and that it was not pretended that any payment had been made on either of the said judgments. Here the plaintiffs rested their cause, and the judge ruled that the evidence was sufficient to take the case out of the statute of limitations.

The defendants produced in evidence another exemplification of the record, in the suit in *Connecticut*, between them and *Eunice Stanton*, containing, not only all that was comprised in the copy which was given in evidence by the plaintiffs, but, also, a variety of additional matter, among which was the execution \*issued on the judgment, to levy the amount thereof on the money, goods, chattels, or lands, of *John Bird*, deceased, in the hands of his executors, the defendants. To this execution the sheriff returned, that he had made demand of *Uriel Holmes*, for money, or goods, in his hands, belonging to the defendants, executors of *John Bird*, to satisfy the execution and his fees, but that he refused showing any. And a return was made of a like demand on, and refused by, *Uriel Holmes*, Jun., and *Seth P. Beers*. The record likewise comprised a statement of the evidence, being, apparently, a bill of exceptions taken at the trial of the cause. The bill of exceptions set forth, in the first place, an account, to recover the amount of which the ac-

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC  
UTORS.

[ \* 194 ]

NEW-YORK,  
May, 1816.

PAWLING  
V.  
BIRD'S EXEC-  
UTORS.

tion was brought, in which the executors of *John Bird* were charged with various sums of money for the nursing, boarding, clothing, &c., of *William* and *Maria*, two infant children of the said *John Bird*, the total amount of which was six hundred and seventeen dollars and twenty-one cents. It stated, in the next place, that it was agreed, on the trial, that the said *Eunice* was married to *Bird* on, or about, the 4th of *October*, 1789, and continued to be his lawful wife until on, or about, the last day of *May*, 1797. The bill of exceptions further set forth a decree of the general assembly of the state of *Connecticut*, passed at a general assembly, held on the 2d *Thursday* of *May*, 1797. This decree recited the petition of the plaintiff *Eunice*, in which a divorce was prayed for, on the ground of the ill-treatment of her by her husband, *John Bird*; it then recited as follows: "That the said *John* hath been served with a copy of said petition, according to the custom and usage of the said assembly, and the petitioner, and the respondent, having severally appeared, by their counsel, learned in the law, and having been, with their proofs, fully heard by this assembly, on the merits of the said petition, this assembly do find the facts stated in said petition to be true; and it being proved to this assembly, that the said *Eunice*, since the date of said petition, hath been delivered of a son and daughter, which are now remaining with said *Eunice*; and it also being made to appear to this assembly, that the son of the said *Eunice* and *John*, in said petition mentioned," (born previously to the commencement of these proceedings,) "hath been, since the date of said petition, forcibly wrested by the said *John* from the said *Eunice*, and carried to parts unknown to said *Eunice*;" Then followed the decree, in these words: "Therefore, it is resolved, by this assembly, \*that the said *Eunice* be, and she is hereby, divorced from the said *John*. And it is further resolved, by this assembly, that the said *Eunice* be, and she is hereby, constituted sole guardian of said son and said daughter, which have been, as aforesaid, born since the date of said petition, until they shall, respectively, attain the age of twenty-one years. And it is further resolved by this assembly, that the said *John Bird* shall, within six months from the first day of *June*, in the year of our Lord one thousand seven hundred and ninety-seven, pay to the said *Eunice* three thousand dollars, as her part and portion of the estate of the said *John*, in lieu of all claims of dower." The bill of exceptions further stated, that it was agreed that *Eunice* accepted of the guardianship of the infants mentioned in the account, who were the same children as were mentioned in the decree, and are the children of *John Bird* and *Eunice*; that the whole of the account accrued for supporting said children, which, it was agreed, was furnished, and without any request from *John Bird*, who never made an express promise to pay the same, while they lived with the plaintiff. The bill of exceptions further stated a release, executed by the plaintiff to *John Bird*, which, after reciting the

[ \* 195 ]

decree of the general assembly, stated that the said *Eunice Bird*, "For the consideration of fifteen hundred dollars, secured, to her full satisfaction, by four promissory notes, executed and delivered to her by Doctor *Seth Bird*, all bearing date, &c., and for the following sums, &c., did, by these presents, release, and forever discharge, the said *John Bird* from all claims, demands, and dues, from, or by force of, the above-recited decree."

NEW-YORK,  
May, 1816.

PAWLING  
V.  
BIRD'S EXEC-  
UTORS.

The defendants gave in evidence the exemplification of another record, which commenced with a *scire facias*, directed "to the sheriffs of the respective counties of *Hartford* and *Litchfield*," &c., and proceeded as follows: "Whereas *Eunice Stanton*, of *Colchester*, in the state of *Vermont*, brought her action to, and before, the Court of Common Pleas, holden at *Litchfield*, within and for the county of *Litchfield*, on the fourth *Tuesday* of *September*, in the year of our Lord one thousand eight hundred and seven, against *Ebenezer Willson* and *Benjamin Smith*, both absent and absconding debtors, out of this state, to parts to the plaintiff unknown, as they were, and are, executors of the last will and testament of *John Bird*, Esq., late of *Troy*, in the county of *Rensselaer*, in the state of *New-York*, deceased, \*by writ, dated the second day of *April*, in the year of our Lord one thousand eight hundred and seven, which writ, according to the command therein given, was duly served on *Uriel Holmes*, Esq., of *Hartland*, in said *Hartford* county, and on *Uriel Holmes*, Jun., of *Litchfield*, in said *Litchfield* county, who were, and are, debtors, and indebted to the said *Ebenezer* and *Benjamin*, in their said capacity; and, also, on *Seth P. Beers*, Esq., of said *Litchfield*, who then was, and still is, both attorney and debtor to the said *Ebenezer* and *Benjamin*, in their said capacity, which action, by continuance and appeal, came duly to and before the Superior Court, holden at *Litchfield*, within and for the county of *Litchfield*, on the first *Tuesday* of *February* last past, when and where the parties appeared; and, on trial duly had, the said *Eunice* did recover judgment thereon against the said *Ebenezer* and *Benjamin*, by the consideration of said Court, for the sum of six hundred and seventeen dollars and twenty-one cents, debt, and for the sum of thirty-five dollars and sixty-five cents, costs of suit, as appears of record; which writ, the return of service thereon, and the record of said judgment of said Superior Court, and of the said Court of Common Pleas, are in the words and figures following, to wit:" (Here the whole of the record, including the execution and return in the suit of *Eunice Stanton* against the defendants, as before stated, are set forth in *hac verba*: the *scire facias* then proceeds:) "And the said *Ebenezer* and *Benjamin* were, at the said times of the said dates of the said writ, and of the said endorsements, absent and absconding debtors out of this state; and the said *Uriel Holmes*, Esq., and *Uriel Holmes*, Jun., Esq., were jointly indebted to the said *Ebenezer* and *Benjamin*, as executors as aforesaid, in and by a debt

[ \* 196 ]

NEW-YORK,  
May, 1816.

PAWLING  
V.  
BIRD'S EXEC-  
UTORS.

[ \* 197 ]

due to the said *John*, while in life, of more than two thousand dollars, which still remains unpaid ; and the said judgment still remains in force and unsatisfied. The said *Eunice*, therefore, says, that the said judgment ought to be affirmed against the said *Uriel* and *Uriel*, Jun. ; and that she ought to have judgment, and a writ of execution, against the said *Uriel Holmes*, Esq., and *Uriel Holmes*, Jun., Esq., for the amount of said judgment, and the fees of service thereon, for the detention thereof. These are, therefore, by authority of the state of *Connecticut*, to command you to cause the said *Uriel Holmes*, Esq., and *Uriel Holmes*, Jun., Esq., &c., to know that they appear before the Superior Court, &c., to show cause, &c." The defendants \**Uriel Holmes*, and *Uriel Holmes*, Jun., appeared, by their attorney, *Seth P. Beers*, and pleaded, "that neither they nor either of them were, at any of the times stated, debtors of the said *Ebenezer* and *Benjamin*, in their said capacity, in and by a debt due to the said *John*, while in full life, to the amount of more than two thousand dollars, nor in any sum whatever, nor were the said *Ebenezer* and *Benjamin*, in fact, at any of the times stated in the said writ, absent and absconding debtors out of this state, as the plaintiff, in her writ, hath alleged, as on file ;" issue being joined on this plea, the Court were of opinion, and found, that the defendants were not "debtors of the said *Ebenezer* and *Benjamin*, in their said capacity, in and by a debt due to the said *John*, while in full life, to the amount of more than two thousand dollars, nor in any sum whatever ; nor were the said *Ebenezer* and *Benjamin*, at any of the times stated in said writ, absent and absconding debtors out of this state, as the plaintiff in her writ hath alleged. Whereupon it is considered and adjudged, that in this case the defendants shall recover their costs," &c.

The record of the *scire facias* further stated, that it was agreed by the parties thereto, that *Willson* and *Smith* had never resided in *Connecticut*, but had always resided at *Troy* ; that *J. Bird* had, for many years previous to his decease, resided at *Troy*, where he died ; that his will had been proved in *New-York*, but never in *Connecticut* ; and that it was proved that *Uriel Holmes*, and *Uriel Holmes*, Jun., were indebted, to the amount of more than two thousand dollars, to *Seth Bird*, of whom *John Bird* was the residuary legatee and sole executor.

The defendants, also, gave in evidence an exemplification of an act of the state of *Connecticut*, enacted in *May*, 1726, entitled "*An act for the recovery of debts out of the estate or effects of absent or absconding debtors ;*" and of certain acts supplementary thereto. The material parts of the act of 1726 are as follows : "*Be it enacted by the governor and council, and house of representatives, in General Court assembled, That it shall and may be lawful for any creditor to cause the lands, goods, or effects, of his absent or absconding debtors, not residing within this state, to be attached, in whosoever hands or possession the same are or may be found : And the attaching of any part*

168

thereof shall secure, and make the whole that is in such person's hands liable, in the law, to respond the judgment to be recovered upon \*such process, and shall be subject to be taken in execution for satisfaction thereof, as far as the value thereof will extend; and the person in whose hands any such lands, goods, or effects, are, shall, accordingly, expose the same.

"2. That, when no lands, goods, or effects, of any absent or absconding debtor, in the hands of his attorney, factor, agent, or trustee, shall be exposed to view, or can be found or come at, so as to be attached, it shall and may be lawful for any creditor to bring his action against his absent or absconding debtor, for the recovery of his dues; in which case the creditor, by some proper officer, shall leave an attested copy of his writ, at least fourteen days before the time of trial, with such absent or absconding debtor's attorney, factor, agent, or trustee, or at the place of his or their usual abode; which service shall be a sufficient citation for the creditor to bring forward his action to trial, unless the debtor be an inhabitant of this state, or hath for some time dwelt therein; in which case a like copy shall be left by such officer at the dwelling-house, lodging, or place of his last or usual abode.

"3. That such attorney, factor, agent, or trustee, upon his desire, shall be admitted to defend his principal, in such suit, through the course of law, according to the nature of the action. But if the debtor be not in this state, and no attorney, factor, agent, or trustee, appear, to defend in the suit, the Court shall continue the action to the next Court, and then, if need be, shall continue the same once more to the next Court, (that such attorney, &c., may have an opportunity to notify his principal,) and then, without special matter alleged and allowed in bar, or abatement, the action shall come to trial, and judgment be rendered for the plaintiff, and all the goods or effects which are in the hands of such attorney, factor, agent, or trustee, to the value of such judgment, (if so much there be,) shall be liable, and subjected to execution granted upon such judgment for, or towards, the satisfying the same; and, from the time of serving the writ or summons as aforesaid, shall be liable, and be secured in law in the hands of, and may not, otherwise, be disposed of by, such attorney, factor, agent, or trustee.

"4. And if such attorney, factor, agent, or trustee, after the time of his being served with a writ or summons, as aforesaid, taken out against his principal, (being an absent or absconding debtor,) shall transfer, remit, dispose of, or convert any of the \*goods or effects of such debtor, in his hands, at the time of such service, within what shall satisfy the judgment given as aforesaid, or that shall not discover, expose, or subject the goods or effects of such debtors, in his hands, to be taken in execution for and towards the satisfying the judgment so far, as what in his hands or possession will extend, shall be liable to satisfy the same of his own proper goods or estate, as much as

NEW-YORK;  
May, 1816.

PAWLING  
V.  
BIRD'S EXE-  
CUTORS.  
[ \* 198 ]

[ \* 199 ]

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC-  
UTORS.

if it were his own proper debt; and a writ of *scire facias* may be taken out from the clerk of the Court where the judgment was given, to be served on such attorney, factor, agent, or trustee, requiring him to appear before such Court, and to show cause, if any he have, to the contrary thereof; and upon default of appearance of such attorney, factor, agent, or trustee, or refusal to disclose, upon his oath, (which oath such Court is authorized to administer,) what goods or effects of the debtor are, or were, in his hands or possession, then judgment shall be entered up against him of his own proper goods or estate, as though it was his own debt, and execution shall, in usual form of law, be granted thereon.

"5. That the debts due to any such absent or absconding debtor shall be considered as his effects, in the hands of the person from whom the same are due, who shall be considered as his agent or trustee, and be obliged to account for the same under oath; and recovery may be had against him in the same manner as for goods or chattels of such absconding debtor."

The first section of the additional act, of *October, 1807*, is as follows: "That whenever a *scire facias* shall be brought on said statute, to recover a debt due to, or the goods and effects of, an absent or absconding debtor, in case any person or persons, either jointly or severally, claim such debt, as assignee or assignees thereof, or such goods or effects, as owner or owners thereof, the defendant, in such *scire facias*, having notice or knowledge of such assignment, ownership, or claim, may give notice, in writing, signed by proper authority, and duly served, to such claimant or claimants, or his, her, or their attorney, that such *scire facias* is pending, and that such claimant or claimants may, if he, she, or they, see cause, appear and defend against such *scire facias*, and thereupon, unless such claimant or claimants shall, within such time as the Court, before whom the *scire facias* was pending, may direct, give to such defendant, sufficient security to the approbation of such Court, to indemnify him against all costs arising in such *scire facias*, such defendant may suffer judgment by default, or otherwise," &c.

[\* 200]

\*The defendants also gave in evidence, by consent, the deposition of *Seth P. Beers*, who stated, that *Uriel Holmes*, and *Uriel Holmes, Jun.*, on being warned on the *scire facias* against them, gave notice thereof to the deponent, who was the agent of the defendants, *Willson and Smith*; that the deponent, in conformity to the provisions of the statute of *October, 1807*, above mentioned, one of the acts, in addition to the act respecting absent and absconding debtors, gave security, on behalf of *Willson and Smith*, to *Uriel Holmes*, and *Uriel Holmes, Jun.*, to indemnify them against the costs which had accrued, or might accrue, on the writs of *scire facias*, which security they accepted; and thereupon the deponent appeared, and was ad-  
170

mitted, by the Court, as attorney for *Willson* and *Smith*, to defend in the proceedings on *scire facias*, in the names of *Uriel Holmes*, and *Uriel Holmes, Jun.*; and that a defence was accordingly made, and judgments were rendered in favor of the defendants on said writs of *scire facias*; that the defences so made were made solely for the benefit, and in behalf of *Willson* and *Smith*; and that the deponent appeared as attorney, and defended, by their request.

A verdict was, then, taken for the plaintiffs, for the amount of the debt and costs recovered by the judgment in *Connecticut*, with interest, subject to the opinion of the Court, on a case containing the facts above stated.

*Woodworth*, for the plaintiffs. Though the process in the original suit, in *Connecticut*, should be regarded as a nullity, yet, as the defendants appeared and contested the cause, through all its stages, they must be concluded by the judgment. No doubt, the statute of limitations may be pleaded in bar to an action of debt on a judgment given in another state; but a subsequent acknowledgment, or admission of the debt, is sufficient to take the case out of the statute.†

The decision of the cause, on a motion for a new trial in the Supreme Court of *Connecticut*, will be found in 3 *Day's Reports*, 137. It cannot be said that the judgment was unduly or irregularly obtained. This Court, in *Taylor v. Dryden*,‡ have said, that a judgment in another state is presumptive evidence of a just demand, and it is incumbent on the defendant, in an action on the judgment here, to impeach its justice by positive proof of its irregularity or unfairness. The case of *Kilburn v. Woodworth*§ may be cited for the defendants, but it is not in \*point; for there the defendants never had any notice whatever of the suit, and were out of the state where the judgment was given. Here the defendants regularly appeared and went to trial; and it is a settled principle, that a defendant cannot take advantage of any defect or irregularity in the process, after he has appeared and pleaded. By appearing, he admits the competency of the plaintiff, the regularity of the process, and the jurisdiction of the Court.||

The case of the plaintiffs against the *garnishees*, in which they failed, is reported in 4 *Day's Rep.* 87.

*Henry*, and *Buel*, contra. In the suit against the *garnishees*, the Supreme Court of Errors, in *Connecticut*, decided, that the process, by *foreign attachment*, as it is called, could not be sustained against executors or administrators, to recover a debt due from their testator or intestate. They refused to enforce the original judgment.

1. We contend, that the statute of limitations is a bar in this case;¶ and that there is not sufficient evidence to take it out of the statute. If all the words of *Smith*, as stated by the witness, *Livingston*, are taken together, and fairly understood, they do not amount to an admission of debt, but merely of the existence

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC  
UTORS.

† *Shuby v. Champlin*, 4 *Johns. Rep.* 463.

‡ 8 *Johns. Rep.* 179.

[ \* 201 ]  
§ 5 *Johns. Rep.* 37.

|| 1 *Tidd's Pr.* 90, 571. 1 *Str.* 155. 1 *Eas.* 78.

¶ 11 *Johns. Rep.* 168. *Bissell v. Hall*

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC-  
UTORS.

of certain judgments in *Connecticut*. A person acting in a representative capacity, does not stand in the same situation as a person acting in his own right. He has no personal interest in the question. He may be unable to decide whether he ought to pay or not; and may very well say, "I would pay the debt, if I could do it properly and safely."

There ought to be evidence sufficient to authorize a jury to infer a promise to pay.† The statute of limitations is a very beneficial statute, and ought to be favored. Courts have, certainly, gone too far, in taking cases out of the statute.‡

2. The judgments in *Connecticut* were *in rem*. They were founded on proceedings in the nature of a *foreign attachment*, authorized by certain statutes of that state, the first of which was passed in 1726. The object of those statutes is to enable a creditor to obtain execution against the goods or property of an absent and absconding debtor.§

It is admitted, that the domicil of the defendants has always been in this state. A person cannot be recognized as an executor, or in his representative capacity, out of the state in which the letters testamentary or probate are granted.|| They could not be recognized in *Connecticut*, as the executors of *John Bird*, unless there had been a probate of the will in that state. They could not be made *executors de son tort*. The very nature of the proceeding excludes the idea of its being against the *person*. It is the property of the debtor, in the hands of the *garnishee*, which is the object of the suit. He may appear and defend the action throughout. Such a judgment could not be enforced in *Connecticut*; *a fortiori*, it could not be enforced here. The judgment given on the *scire facias* against the *garnishees*, shows it could not be enforced there; that amounts to a reversal of the original judgment. We have a right to show the judgment to be irregular, or unduly obtained, or illegal, and unjust, or to impeach it, for error on the face of the record.

But it is said, the appearance of the defendants has cured all irregularities. Appearance cures matters of form only, not of substance. The want of an original writ is not cured by an appearance. An appearance cannot alter the nature of the action or process, or convert a proceeding *in rem* into a general action *in rem et personam*. It was necessary for the defendants to go into *Connecticut*, to protect the goods or property, attached there, in the hands of their debtor or attorney. The Court of that state could have no jurisdiction against their persons; and the principle of the decision of Ch. J. *Parsons*, in *Bissell v. Briggs*,¶ where the whole doctrine, as to the effect of judgments in other states, is considered, applies. No faith or credit is to be given to a judgment where the Court had no jurisdiction. The want of jurisdiction is a radical defect, which cannot be cured by appearance, and may be taken advantage of, or given in evidence, under the general issue, in an action on the judgment.††

† *Dunforth v. Culver*, 11 *Johns. Rep.* 146.  
‡ 2 *Saund.* 64. note. 2 *Salk.* 421, 422. 3 *Tinsul. Rep.* 380.

§ *Kirby's Rep.* 311. 5 *Johns. Rep.* 37. 1 *Dallas*, 261.

[ \* 202 ]

|| 11 *Vin. Ab.* 58. pl. 6, 7. 1 *Dall.* 456. 1 *Vern.* 397.

¶ 9 *Mass. Rep.* 432. 469.

†† 1 *Chitty's Pl.* 462. n. b. 6 *East*, 383. 1 *East*, 332. 1 *Term Rep.* 508. 3 *Caines*, 129. 2 *Term Rep.* 344. 3 *Term Rep.* 442.



Again; the judgment in *Connecticut* was illegal and unjust. An action does not lie to compel a father to maintain and educate his child. The law cannot coerce a parent to do more than to keep his child from becoming a charge on the town.† The moral obligation of a father to support his children furnishes no ground for an *assumpsit*. The mother cannot be said to have been the agent of the father; for she was, by the law of *Connecticut*, constituted the guardian of the children, and had the care and custody of them.

\*The mother, morally and legally, is equally bound as the father, to take care of and maintain the children. She could not, therefore, maintain an action against the father. *Dower* is intended for the maintenance of the children as well as the wife;‡ and the *allowance* to the wife was in lieu of dower. On no principle, then, could the action have been supported in this state.

It is questionable whether it is the policy of the constitution of the *United States*, that the Courts of one state should decide on the rights of citizens of other states. The Courts of the *United States* have original jurisdiction in all controversies between citizens of different states, when the matters in difference exceed the value of 500 dollars.

Again; the *divorce* granted by the legislature of the state of *Connecticut*, in the case of *Mrs. Bird*, was a nullity. It is admitted that her husband, *John Bird*, was domiciled, and actually resided in this state, for many years previous to, and at the time of, his death. *Mrs. Bird* left her husband, and went to reside with her parents, in *Connecticut*. Her domicile still continued the same as that of her husband.§ Can the legislature of another state dissolve the marriage ties of our citizens? As well might they pass laws to dissolve every other contract between citizens of this state. Does not the constitution of the *United States* declare, that no state shall pass any law impairing the obligation of contracts?

*Woodworth*, in reply, insisted, that an acknowledgment of the debt, by an executor or administrator, had the same effect, to prevent the operation of the statute of limitations, as if made by the testator or intestate.

The judgment, in this case, is in the usual form of a judgment against executors, that is, to obtain satisfaction out of the goods of the testator, in the hands of his executors.

The amount of the decision of the Supreme Court of *Connecticut*, in the suit on the *scire facias*, is, that they would not aid the plaintiffs to obtain satisfaction out of the particular property in the hands of the *garnishee*. They do not question the regularity or justice of the original judgment.

But, he said, he relied on the case of *Taylor v. Bryden* as decisive. It placed the doctrine, as to the effect of judgments of the Courts of other states, on a fair and unobjection-

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC-  
UTORS.

† Per *Spencer, J.*, 6 *Johns. Rep.* 593. 1 *Bl. Com.* 448, 449.  
2 *Wm. Bl.*

[ \* 203 ]  
1325. 4 *East*,  
84.

‡ *Co. Lit.* 33.  
*Bracton*, b. 2  
ch. 39.

§ 1 *Johns. Rep.*  
424. 5 *Ves.* 157

NEW-YORK,  
May, 1816.

PAWLING  
V.  
BIRD'S EXEC  
UTORS.

able ground. \*Let the defendants show, if they can, that the judgment has been unduly or unfairly obtained.

PLATT, J., delivered the opinion of the Court. This is an action of debt, on a judgment in the Superior Court of the state of *Connecticut*, in favor of *Eunice Stanton*, (formerly the wife of *John Bird*, and now the wife of *Albert Pawling*,) against *Willson* and *Smith*, as executors of *Bird*. The plea is *non detinet*, with notice that the defendants would rely on the statute of limitation, to bar the claim.

The material facts disclosed in the case, are, that, in the year 1797, and for several years prior thereto, *John Bird*, and *Eunice*, his wife, resided at *Troy*, in this state; that, in May, 1797, *Mrs. Bird* left her husband at *Troy*, went to *Connecticut*, and, upon her petition to the legislature of that state, procured a statute divorce from her husband; *John Bird* appearing there by counsel, and opposing the application on its merits.

The statute granting the divorce constituted *Mrs. Bird* sole guardian of her two infant children; who are admitted to be the children of *John Bird*, by that marriage.

After the divorce, *Mrs. Bird* resided in *Connecticut*, and, while there, expended 617 dollars and 21 cents, in nursing, schooling, and clothing those infant children. Those expenses were incurred during the lifetime of *John Bird*, but without any request or interference on his part; and he continued to reside at *Troy* until he died.

In 1808, *Eunice Stanton* (formerly *Mrs. Bird*, and now wife of *Albert Pawling*) recovered a judgment in the Superior Court of *Connecticut* against *Ebenezer Willson* and *Benjamin Smith*, executors of *John Bird*, for the expenses of nursing, schooling, and clothing those two infant children. Those executors then resided, and have ever since lived, at *Troy*; and never were inhabitants of *Connecticut*. Letters of administration upon the will of *John Bird*, were granted in this state, and not in *Connecticut*.

The judgment in *Connecticut* was in a suit against these defendants, as executors of *John Bird*, and as persons "*absent and absconding out of that state to parts unknown*," under a statute of that state, entitled, "An act for the recovery of debts out of the estate or effects of absent or absconding debtors."

[ \*205 ]

\*The defendants were never served with process, nor even notified of the proceedings against them; but, according to the provisions of that act, the process was served by delivering a copy to *Uriel Holmes*, *Uriel Holmes, Jun.*, and *Seth P. Beers*, respectively, then residing in *Connecticut*, who were averred, in the process, to be "*debtors*" to the defendants; and *Beers* is also styled "*attorney*" for the defendants.

It appears that, under authority given by that statute, *Beers*, one of the garnishees, appeared as attorney, and defended the suit, by pleading the general issue for these defendants; but,

for aught that appears, without their consent or privity. The plaintiff *Eunice Stanton* was thereby put to prove her demand; and succeeded in obtaining a verdict and judgment for 617 dollars and 21 cents damages, and 35 dollars and 65 cents costs, to be recovered "of the goods and estate of the said *John Bird*, in the hands of his executors." Execution was, accordingly, issued upon that judgment, and the sheriff returned *nulla bona*; and that the garnishees refused to pay, &c.

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC  
UTORS.

A *scire facias* then issued against the garnishees, to show cause why they should not pay the debt and costs; to which they appeared and pleaded, that they were not debtors of these defendants. Upon which fact, issue was joined; and, upon that issue, judgment was rendered in favor of the garnishees, and they recovered costs. In this proceeding by *scire facias* against the garnishees, it appears, that the executors of *John Bird* interfered so far as to employ an attorney to defend the garnishees.

The defence set up under the statute of limitations, has been obviated by the testimony of *Richard M. Livingston*. We are, therefore, called upon to consider the whole grounds of this action.

1st. It is well settled, that a judgment in another state (one of the *United States*) is to be considered here as a *foreign judgment*, in every respect, except in the mode of proving it, which is regulated by a statute of the *United States*. It is only *prima facie* evidence of a debt, and may be impeached, when attempted to be enforced here, as *unjust*, or *unfair*, or *irregular*. *Hitchcock & Fitch v. Aickin* (1 *Caines*, 460.) *Jackson v. Jackson*, (1 *Johns. Rep.* 432.) *Taylor v. Bryden*, (8 *Johns. Rep.* 173.)

[ \* 206

\*2d. It is also well settled, that a judgment in another state, founded on proceedings by attachment, against the goods of the defendant, he not being within the jurisdiction of such state, is not even *prima facie* evidence of a debt, in our Courts. It is regarded as a proceeding *in rem* merely. To consider it as a ground of action here, *per se*, would be contrary to the first principles of justice. As a proceeding *in personam*, the foreign Court, in such case, had no jurisdiction. *Kibbe v. Kibbe*, (*Kirby*, 119.) *Phelps v. Holker*, (1 *Dal.* 261.) *Kilburn v. Woodworth*, (5 *Johns. Rep.* 37.) *Bissell v. Briggs*, (9 *Mass. Rep.* 462.) *Fisher v. Lane*, (3 *Wils.* 297.) *Buchanan v. Rucker*, (9 *East*, 192.)

In this case, the defendants were domiciled at *Troy*, in this state, at the time of the proceedings against them in *Connecticut*. The notice, or summons, was served on certain persons in *Connecticut*, whom the plaintiff chose to denominate "*debtors of the defendants*;" and, for aught that appears, the defendants never heard of those proceedings until after the judgment against them, on which the plaintiffs now rely. It is not true, (according to the case,) as the counsel for the plaintiffs assumed on the argument, that the defendants appeared and litigated the

NEW-YORK,  
May, 1816.

PAWLING  
v.  
BIRD'S EXEC-  
UTORS.

plaintiff's claim in the suit against them in *Connecticut*. The appearance was by the garnishees, *pro forma*, who were authorized, by the law of that state, to enter an appearance, and defend the suit for their supposed creditors, without their knowledge or consent. The record states, that "the defendants appeared by *Seth P. Beers*, their attorney," and pleaded, &c.; but, in the absence of all other evidence on that point, this must be construed to mean, that an appearance and plea were entered by virtue of the power expressly given to the garnishees for that purpose, by the statute. An "attorney," on whom process may be served under that statute, means a general agent, or a person employed by the defendants to conduct other suits; not an attorney previously appointed by the defendants to appear for them in the particular suit, whenever it might be commenced against them. There is no evidence that the defendants ever interfered or took any notice of those proceedings, until the *scire facias* against the garnishees. Then, and not before, it appears by the testimony of Mr. *Beers*, they employed an attorney, and conducted the defence for the garnishees.

[ \* 207 ]

\*I am, therefore, of opinion, that the judgment against the defendants *in personam*, was without jurisdiction, and, therefore, void. So that this record, on which the plaintiffs rely, is not even *prima facie* evidence of a debt.

Whether, as a proceeding *in rem*, it was authorized by the statute of *Connecticut* (now before us) against executors or persons sued *in autre droit*, in any case, is very questionable. *M'Combe v. Executors of Hudson*, (2 *Dallas*, 73.) *Jackson v. Walsworth*, (1 *Johns. Cas.* 372.)

Besides, it appears that judgment was finally rendered in the Superior Court of *Connecticut*, in favor of the garnishees, on the very ground that they were *not debtors, or trustees*, of these defendants.

The provisions of the statute of *Connecticut* are analogous to the proceedings by attachment against absconding debtors, according to the custom of *London*; and in the case of *Masters v. Lewis*, (1 *Ld. Raym.* 56.) it was decided that "garnishment can only be where the garnishee is liable to the action of the defendant."

Can it be possible, therefore, that even in *Connecticut* these defendants would be held, in *any respect*, liable, on the ground of those judgments? It has there been judicially determined, and the records expressly show it, that the defendants were out of the jurisdiction of that state; that the process was served on the garnishees only; and will it be contended that those proceedings can have any validity any where, for any purpose; when it also appears, by these very records, that neither of the persons proceeded against, as garnishees, did, in fact, stand in the relation of "attorney, factor, agent, or trustee," of the supposed absconding debtors?

Such a doctrine would be unworthy of the enlightened juris-

prudence of that respectable state ; and, a *fortiori*, it would be unjust to allow such proceedings, under a foreign jurisdiction, to form the basis of a legal claim in our own Courts.

If the defendants had actually appeared in the suit against them, as absconding debtors, it would not, in my judgment, have altered the character of that record. Such appearance and defence must be deemed to have been made merely to *protect the pledge*, which was the legitimate object of that proceeding.

But, admitting the record to be valid in *Connecticut*, as a proceeding *\*in personam*, other important questions have arisen upon the evidence disclosed in this case.

Are we to acknowledge the validity of the divorce, in *Connecticut*, between *John Bird* and his wife, they being, at that time, domiciled in this state? For, if they were not legally divorced, it follows, that the wife could not sue her husband, nor the executors of her husband, upon any promise, express or implied, between the husband and wife.

In the case of *Jackson v. Jackson*, (1 *Johns. Rep.* 424.) a citizen of this state married a wife in this state, and after living here together about a year, the wife left her husband, went into the state of *Vermont*, and there obtained a decree of divorce, according to the law of that state, on the ground of cruel treatment, the husband continuing to reside in this state. This Court decided that the wife could not acquire a domicile distinct from that of her husband ; that the proceeding on the part of the wife was an evasion of the law of this state, which does not allow of a divorce, except for adultery ; and that no action could be maintained for alimony on such decree.

The rule has since been recognized in the case of *Tovey v. Lindsay*,† (1 *Dow's Rep.* 117.) in the *English* house of lords. In that case the marriage was contracted at *Gibraltar*, "within the pale of the *English* law:" the parties were, afterwards, domiciled in *England* ; and then went to *Scotland*, and were there divorced *a vinculo*. Though the house of lords remitted the cause for a review on the whole matter, yet they, evidently, admit the principle, that an *English* marriage could not be any where dissolved, except by an act of parliament ; and Lord *Eldon* observed that it had been so decided, lately, by the unanimous opinion of the *twelve* judges of *England* ;‡ though the parties, therefore, may have been, at the time of the divorce, in *Scotland*, and domiciled there *bona fide*, yet such a divorce would not dissolve a contract of marriage made in *England*. (See, also, *Harg. Co. Litt.* 79. b. n. 44. *Hub. de conflictu legum. Opinion of Eyre*, Ch. J. 2 *H. Bl.* 410. 3 *Mass. Rep.* 158.)

But this case is distinguishable from that of *Jackson v. Jackson*, (1 *Johns. Rep.* 424.) in one strong feature. Here the marriage (as may fairly be inferred from the evidence) was contracted in *Connecticut* ; and both the parties, although domiciled in this state at the time of the divorce, appeared and litigated the question of divorce in *Connecticut*. In the case of *Jackson*

NEW-YORK  
May, 1816.

PAWLING  
V.  
BIRD'S EXEC-  
UTORS.

[ \* 208 ]

† May, 1813.

‡ *Lilly's case*.

NEW-YORK,  
May, 1816.

DYERT  
v.  
COPPERNOLL.

\*v. *Jackson*, the parties were not only domiciled here, but the contract of marriage was made in this state.

The investigation of this cause has led me to examine thus far the question of divorce; but whether the *Connecticut* decree of divorce, in the case of *John Bird*, is obligatory here, appears to me to be a question not necessarily involved in the decision of this cause. I, therefore, forbear to express an opinion on that difficult and important point, until a case shall require our decision upon it.

But if the validity of the divorce be admitted, then, in judgment of law, the obligation to support the children of that marriage was equal upon both the parents; there being no special contract between the parties, nor any provision on that subject in the statute granting the divorce. The only provision in regard to the children (and that was made upon the express application and request of Mrs. *Bird*) was, that the father should be divested of the custody and control of them, and that the mother should be their sole guardian.

The mother being under equal natural obligation with the father to maintain her offspring, and no positive law of *Connecticut* being shown on that subject, I can see no legal ground to authorize a recovery by the mother against the father, for the maintenance of the children. At most, she can have a right to sue him for *contribution* only.

Upon the whole case, I am of opinion, that the judgment is not even *prima facie* evidence of a debt, being without jurisdiction, as a proceeding *in personam*; and,

2dly, Admitting the jurisdiction of the Superior Court of *Connecticut*, and admitting, also, the validity of the divorce, yet the judgment in favor of the divorced wife against the executors of her former husband, for the whole maintenance of their common children, was contrary to law.

The defendants, are, therefore, entitled to judgment.

Judgment for the defendants.

[ \* 210 ]

\*DYGERT against COPPERNOLL.

Where, on the plea of a former judgment, in which the present plaintiff, being defendant, ought to have set off his demand, the justice, by whom that judgment was rendered, appears as a witness, and produces his minutes of the judgment, in which there is an ambiguity as to the form of the action, the evidence of the justice is inadmissible to show that the action was founded on contract, if it appear that he has in his possession the original written declaration, which is evidence of a higher nature.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of assumpsit in the Court below, against the plaintiff in error, in which the latter pleaded a former trial between the same parties, in which the defendant in error, the plaintiff below, ought to have set off the

A set-off is not admissible in a justice's Court in an action founded on tort. (a)

(a) *Keeler v. Adams*, 3 *Caines's Rep.* 84. *Moore v. Davis*, 11 *Johns. Rep.* 144.

present demand. The justice, before whom the former action was tried, appeared as a witness, and produced his minutes; from which it appeared, that a judgment had been rendered in a suit of *Dygert v. Coppernoll*, stated thereon to be a plea of *trespass on the case*, but without specifying whether it were founded on *tort* or *contract*; he also stated that the original declaration was in writing, which he had left at home; and, on its being proposed by the defendant below, that he should explain, from memory, what was the ground of that action, in order to ascertain whether the set-off might legally have been made, the evidence was overruled, and judgment given for the plaintiff below.

NEW-YORK,  
May, 1816.

MILLON  
v.  
SALISBURY.

*M'Koun*, for the plaintiff in error.

*Dodge*, contra.

*Per Curiam.* No set-off can be allowed, except it be against a claim founded in contract, express or implied. The minutes of the former judgment are equivocal and uncertain as to the cause of action. *Trespass on the case* may be for tort or contract; and, to explain that ambiguity, the written declaration which the justice had left at home was the best evidence; and, therefore, the parol evidence to that point was properly excluded.

The judgment ought to be affirmed

\*MILLON against SALISBURY.

[ \* 211 ]

IN ERROR, on *certiorari* to a justice's Court.

*Salisbury*, the plaintiff below, brought an action against *Millon* for the hire of, and injury done to, a horse belonging to *Salisbury*.

The defendant below hired the horse to go from *Cocksackie* to *Schodack*, and the next day after his arrival at the latter place, the horse was found to be lame in one foot; and, the lameness increasing, the defendant below was obliged to leave the horse there, and hire another with which to return. About four weeks after, the horse was brought home, and showed signs of gravel working out above the hoof. There was no evidence of improper treatment of the horse; but, notwithstanding, a verdict and judgment were given for the plaintiff below.

*Per Curiam.* *Millon* being a bailee for hire, and chargeable with no ill treatment, and having employed the horse to no other use than that which was expressly agreed on, and paid for, he is not liable for such an injury as the plaintiff below complains of.

As to all accidents naturally incident to the use of the horse, in the manner contracted for, the law imposes the risk on the bailor. Injustice has been done, and the judgment ought to be reversed.

Judgment reversed.

Any damage befalling a chattel while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was bailed, must be sustained by the bailor. So, if a horse be hired to go a journey, and, during the due prosecution of the journey, without any ill treatment by the hirer, become lame, the hirer is not answerable for damages.

NEW-YORK,  
May, 1816.

VANDEN-  
BURGH  
V.  
VAN BERGEN.

\*VANDENBURGH against VAN BERGEN.

THIS was an action on the case, for overflowing the plaintiff's land, by means of a mill-dam erected by the defendant across the *Cocksackie* creek. The cause was tried at the *Green* circuit, the 26th of *September*, 1815.

The plaintiff proved that he possessed a farm contiguous to the west bank of the *Cocksackie* creek, extending along the same one fourth of a mile, a considerable part of which, adjoining the creek, was low land. That, in 1810, the defendant erected, on his own land, about three fourths of a mile below the plaintiff's land, a saw-mill and dam on the creek, which he had ever since kept up; and that the creek, in consequence, when swelled by rain, overflowed several acres of the plaintiff's land.

*A.*, in 1734, granted to *B.* a certain saw-mill on the *Cocksackie* creek, with the ground and stream of water thereunto belonging; "And also the full liberty and license to erect and build another mill on any other place, at, or on, the same creek, with like liberty of ground and stream of water." Held, that though *B.*, in his lifetime, would have had a right to have erected a mill on the creek, and to have overflowed, so far as was reasonable and necessary, the land of *C.*, adjacent to the creek, and subsequently purchased of *A.*; yet that *B.* never having elected a place for another mill, or exercised his right to erect such other mill, during his lifetime, it became extinct at his death; and the right could not be claimed or

The defendant, to show his right to erect the dam, gave in evidence, 1. The patent of *Cocksackie*, dated the 23d of *May*, 1687, to *John Brouck* and *Martin Garretse*, which included the plaintiff's farm and the place where the mill-dam was erected; 2. A deed, dated the 29th of *June*, 1734, from *John Brouck* to one of his sons, *Casparus Brouck*, for certain lands in the *Cocksackie* patent, not including the plaintiff's farm or premises overflowed; which contained the following clause: "Also, all my full share, right, and title of, in, and to a certain saw-mill, standing and being on the *Cocksackie* kill or creek, in the said county, with the ground and water stream of the said creek thereunto belonging; and full liberty and license to erect and build another mill on any other place, at, or on, the same creek, with like liberty of ground and stream of water." Under the last part of this clause, the defendant claimed his right of erecting the dam in question.

*Casparus Brouck* died, leaving an only child, a daughter, who married *John H. Widbeck*. The defendant further gave in evidence, 3. A release from *John H. Widbeck* and his wife, dated the 16th of *February*, 1768, to *John V. Douw*, for land in *Cocksackie* patent, with the privilege of erecting a mill, &c., as in the former deed. 4. A release from *Douw* to *John H. Widbeck*, dated the 17th of *February*, 1768, for the same land, with the like clause, as to the privilege of erecting a mill-dam; 5. A \*release from *Widbeck* and wife, dated the 14th of *April*, 1781, to *Anthony Van Bergen*, and *Henry Van Bergen*, which, after reciting the deed from *Brouck*, of the 29th of *June*, 1734, released "all his right, title, interest, claim, and demand whatsoever, of, in, and to a certain fall, situate, lying, and being in a tract of land granted to *Martin Garretse* and *John Brouck*, in a certain creek or kill, known by the name of the *Cocksackie* kill, and

or share in a stream of water, does not authorize the grantee to appropriate or use the stream to the injury of others, jointly interested in it. The property in a stream of water is indivisible. (b)

(a) *Jackson v. Van Buren*, *infra*, 525.

(b) *Provost v. Calder*, 2 *Wendell's Rep.* 517.



privilege of erecting a mill thereon, with the ground and water-stream of the said kill, and, also, an acre of ground adjoining the said fall." 6. A quit-claim, dated the 8th of *January*, 1725, from two of the sons of *Martin Garretse*, to their brother *Petrus*, for all their right in the patent. 7. A release, dated the 20th of *October*, 1784, from *Henry* and *Peter Van Bergen*, two sons of *Petrus Van Bergen*, and *Harmanus Cuyler*, and *Elizabeth*, his wife, the daughter of *Petrus*, to their brother *Anthony*, for certain lands; and, also, of an undivided moiety of the fall, &c., and an acre of land adjoining, described in the deed from *Widbeck* and wife to *Anthony* and *Henry Van Bergen*. 8. Another deed from *Anthony Van Bergen*, *Peter Harmanus Cuyler*, and wife, to *Henry Van Bergen*, dated the 20th of *October*, 1784, for an undivided moiety of a certain mill," &c. "And, also, an undivided moiety or half part of, and in, one other fall in the *Cocksackie* creek, and of, and in, the one acre of land adjoining to the same fall, on the north side of the kill," &c. "And, also, an undivided moiety or half part of any mill or mills, which may hereafter be erected within the limits of lot No. 19, on or near the uppermost fall in the kill, and of an acre and a half of land contiguous to the said mill or mills, with liberty of passing," &c.

9. The will of *Anthony Van Bergen*, dated *February* 10th, 1792, devising to his son *Peter*, among other things, "All the privilege and other liberties I am lawfully entitled to, of, and in, the *Cocksackie* mill rights," &c., in fee.

It was admitted, that *Peter*, the devisee, was dead, and that the defendant was his son and heir at law.

10. A deed from *Henry Van Bergen* and wife, to the defendant, dated 8th *December*, 1808, for three parcels of land on the southerly side of *Cocksackie* creek, describing them, "and the privilege of the water of the same creek, and the land thereby covered, and also the free use of any mill or mills, which might thereafter be erected," &c.

\*The plaintiff proved an uninterrupted possession of his farm for above 60 years, under *Mantie Brouck*, daughter of *John Brouck*, one of the patentees. It was also proved, that no dam, or mill, had ever been erected on the fall where the dam erected by the defendant is built, until the one made by him, and that the saw-mill, referred to in the different deeds, was situated lower down the creek.

The jury found a verdict for the plaintiff for 120 dollars damages, subject, by consent, to the opinion of the Court, on the question of the right of the defendant to overflow the land of the plaintiff.

*Bronk*, for the plaintiff, contended that the clause in the deed of the 29th of *July*, 1734, amounted to no more than a bare license to erect a mill, and was, in its nature, revocable, and had been revoked by the death of the grantor.

NEW-YORK,  
May, 1816.

VANDEN-  
BURGH  
V.  
VAN BERGEN.

[\*214]

NEW-YORK,  
May, 1816.

VANDEN-  
BURGH

V.  
VAN BUREN.

† 5 Com. Dig.  
806. Plead. (3  
M. 35.)

† 4 Johns. Rep.  
81.

The farm claimed under *J. Brouck* was sold or disposed of by him; for the possession of *M. Brouck* had been long enough to authorize the presumption of a grant. The license, therefore, was determined by the sale of the land.†

Again; this right, or license, was an incorporeal hereditament,‡ and no place was designated by the grantor, in which it was to be exercised. Unless, then, *Casparus Brouck*, in his lifetime, elected a place on which to erect the mill and dam, or to exercise the right, it was gone forever at his death.

But, admitting that this privilege could descend, or be transferred with the land, it gave no right to overflow the plaintiff's land. It is evident, that the grantor intended that *C. Brouck* should elect a place where he might erect a mill, without injury to others; there were several mill-seats on the stream; it could not be intended that he should have the control of the whole, or might overflow all the adjacent land.

The deed to *H. B.*, of the 20th of October, 1784, contains several restrictions. The right is limited to the erection of one mill, and in a particular place.

Again; the defendant derived no title to this fall through *Casparus Brouck*. A place was selected for a mill, by *Widbeck*, in his lifetime, and the election of the mill-seat being once made is final and conclusive.

† 4 Johns. Rep.  
81.

[ \* 215 ]

In *Thompson v. Gregory*,§ the Court held, that where a grant of land contained a reservation of a right to erect mills on the \*premises, and to overflow as much of the land as might be necessary for the mill, the right, until it was exercised, was to be considered as an *exception*, and void for uncertainty. No estate in fee, in the mill-seat, was granted, because no place was designated. And, where nothing passes to a grantee before election, there the election must be made in the lifetime of the parties.||

† Co. Litt.  
145. a. Hob.  
174. Dyer, 281.  
Vin. Abr. Elect.  
(A.) pl. 1.

† 7 Johns. Rep.  
556. 10 Johns.  
Rep. 301. 377.

Again; admitting the right to have originally existed, yet a release, or extinguishment of it, is to be presumed from the long and uninterrupted possession, without any claim or exercise of the right.¶

*Van Vechten*, contra, contended, that the right of erecting a mill, or mills, on the premises, was connected with the freehold granted. The grant operated as well on the mill-seat, or ground on which the mill was to be erected, as on any other part of the premises conveyed. Every grant is to be construed according to the subject matter and intent of the parties. That is certain, which may be made certain by the election of the party capable of enjoying the right.

But it is said, that the right of election was lost by the death of the grantee. But there is a distinction; as where the interest vests immediately by the grant, there the election may be made by the heir or executor of the grantee.††

†† Co. Litt.  
145. a. Com.  
Dig. Elect. (B.)

As to the doctrine of presumptions: The Court must look at  
182

the right as it is, and the principle on which the doctrine of presumption rests. It is founded on the supposed acquiescence of a party in the usurpation of another, for a certain length of time. The possession from which the presumption arises, is in collision with the right. There must be an acquiescence in acts done in hostility to the right, to afford the legal presumption of a release or extinguishment of it. Here, nothing of that kind is pretended or shown. The situation of the property, and the facts, do not afford any such presumption. The Court, in *Thompson v. Gregory*, did not say, that such a grant would be inoperative and void.

But it is said, the deed of *Casparus Brouck* gave no right to overflow the adjacent land. Where a thing is granted, every thing necessary to its enjoyment passes. If the right to erect a mill could be of no use without the privilege of overflowing the land, it must be considered that this privilege was intended to be given.†

*Van Dyck*, in reply, was stopped by the Court.

PLATT, J., delivered the opinion of the Court. This is an action on a case for overflowing the plaintiff's land, by means of a mill-dam erected by the defendant on the *Cocksackie* creek.

The defendant claims a right to maintain the dam, and to do the acts complained of, partly under a conveyance, in fee simple, from *John Brouck* (one of the patentees) to *Casparus Brouck*, dated the 29th of June, 1734, for an undivided moiety; and partly under a conveyance, in fee simple, from *Henry Van Bergen* and others to *Anthony Van Bergen*, dated the 20th of October, 1784, for the other undivided moiety.

The first deed conveys a saw-mill on the *Cocksackie* creek, "with the ground and water stream thereto belonging," "and full liberty and license to erect and build another mill on any other place at, or on, the same creek, with like liberty of ground and stream of water." The latter of said deeds conveys (referring to another deed) "an undivided moiety of, in, and to, a certain fall, situate, lying, and being in a tract of land granted to *Martin Garretse* and *John Brouck*, in a certain creek or kill, known by the name of the *Cocksackie* kill, and privilege of erecting a mill thereon, with the ground and water stream of said kill; and, also, one acre of ground adjoining said fall."

The defendant deduces all the interest and estate granted by the said deeds, by a chain of conveyances down to himself; and it appears that, about 4 or 5 years ago, he erected a mill-dam, now complained of, upon his own land, at a fall on said creek where no mill or dam had ever before been built.

The plaintiff proves a continued and uninterrupted possession of his farm for the last 60 years, derived from *Mantie Brouck*, a daughter of the patentee.

I am of opinion that the defendant has failed in his attempt to show a right to overflow the plaintiff's land.

NEW-YORK  
May, 1816.

VANDEN-  
BURGH  
V.  
VAN BERGEN.

[ \* 216 ]

† *Shep. Touch*  
c. 5. s. 1. 2. p  
89, 90, 91. notes  
1, 2, 3, 4.

NEW-YORK,  
May, 1816.

VANDEN-  
BURGH  
V.  
VAN BERGEN.  
[ \* 217 ]

The deed from the *Van Bergens* (dated the 20th of October 1784, for their moiety, does not, in the terms of it, profess to grant any privilege in the water *beyond the limits* of the mill-site, or falls, intended to be conveyed by that deed. The right of building a dam at that place must be exercised in such a manner \*as not to injure the previous rights of other persons. Besides, the grant of an *undivided share* in a stream of water would not authorize the grantee to appropriate or modify the stream to the injury of others, who have a joint interest in it. The property in a stream of water is *indivisible*. The joint proprietors must use it as an entire stream, in its natural channel. A severance would destroy the rights of all.

As to the right claimed under the deed to *Casparus Brouck*, in 1734, it was a "liberty and license" to erect a mill on any part of the creek, and to use and convert the stream of water in a reasonable manner for that purpose; and it does not appear that the present dam is unreasonably high, or unusually constructed.

*Casparus Brouck* himself would, undoubtedly, have had a right to do the very act now complained of, against any person claiming title under a subsequent conveyance from *John Brouck*. The question, therefore, is, whether the privilege granted, or the license given, by the deed to *Casparus Brouck*, has expired or been extinguished. According to *Co. Litt.* 145. A., and *Vin. tit. Election*, (*Com. Dig. tit. Election*), "where an interest vests immediately by the grant, election may be made by the heirs," &c. So, "where an election is coupled with an interest, such election is descendible." But, "if nothing passed or vested in the grantee before his election, it ought to be made in the life of the parties." "When election creates the interest, nothing passes till election." "A feoffment of a house and 17 acres of land, parcel of a waste, the *feoffee*, and not his heirs, must elect, or else the grant is void."

Tested by these rules, I am clearly of opinion, that the grant or license to build a mill any where on the *Cocksackie* creek, with the land and water necessary for that object, vested no interest or estate absolutely in the grantee, at the time of executing the deed. The right was *potential* merely; it could vest only upon the location and election to be made by the grantee. It appears there were, at least, four mill-sites on that creek. It is certain that *Casparus Brouck*, in his lifetime, was not actually vested with the title to any particular mill-site, by virtue of that general grant. His election and location was necessary to consummate the title. He never exercised his right; and by his death it became extinct.

\*The election, in this case, was not "coupled with an interest," in the sense of Lord Coke. He means an election coupled with an interest which vests absolutely at the time of the grant. As if there had been a grant of a definite mill-site coupled with the privilege of flowing. Then the interest in the principal subject

[ \* 218 ]

of the grant would have vested immediately ; and the appurtenant right of flowing would have followed it to the heir, who might elect to exercise the privilege of flowing whenever he pleased. The plaintiff is entitled to judgment.

NEW YORK,  
May, 1816.

LORD  
v.  
KENNY.

Judgment for the plaintiff.

### CLAYTON *against* PER DUN.

IN ERROR, on *certiorari* to a justice's Court.

It appeared that, after issuing the warrant, and before the day of trial, in this cause, the justice removed with his family into a house which had been occupied as a tavern, under an agreement with the former occupant, that he, the justice, might "continue the tavern in the said house, until the license could be renewed." The cause was tried in that house a few days after the justice had taken possession of it. The tavern sign of the former occupant was still kept up, and travellers called as usual, and drank spirituous liquors, and paid for them ; but the justice returned, that he did not consider himself as keeping a tavern. Judgment was given for the now defendant, who was defendant in the Court below.

A justice of the peace who, *in fact*, keeps a tavern, although he have no license for that purpose, is disqualified from trying a cause.

And it is immaterial whether the suit were instituted before or after he commenced keeping tavern.

Appearing and going to trial will not, in such case, confer jurisdiction on the justice.

(a)

*Per Curiam.* The evidence clearly shows, that the justice kept a tavern *in fact* ; and whether he had, or had not, a license for that purpose, he was equally disqualified for trying causes as a justice. Nor is it material that the suit was instituted before he became so disqualified ; nor would it cure the defect if the plaintiff below did appear and consent to the trial, because such consent could not confer jurisdiction. *Low v. Rice*, (8 *Johns. Rep.* 409.) on the two last points, is decisive.

The judgment must be reversed.

(a) *Striker v. Mott*, 6 *Wendell*, 465.

### \*LORD *against* KENNY.

[ \* 219 ]

IN ERROR, on a *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, for injury done to a horse.

The plaintiff below had agreed to sell a horse to the defendant, and received his note for 120 dollars as the price of the horse ; but it was, afterwards, agreed that the defendant might, if he chose, within a reasonable time, deliver back the horse to the plaintiff, in as good condition as when he received him, and take

Where, after the sale of a chattel, it is agreed that the vendor may, within a reasonable time, return it, and receive back the price, if returned in as good condition as at the time of delivery, and

the vendee, afterwards, rescinds the contract, and returns the chattel to the vendor, who receives it without objection, and gives back the price, the latter is concluded, by his own act, from maintaining an action against the vendee for any deterioration of the chattel not arising from a secret injury.

NEW-YORK,  
May, 1816.

SHELDON  
v.  
SHELDON'S  
EXECUTORS.

up his note. The defendant below, accordingly, did, afterwards, rescind the contract, by redelivering the horse, which the plaintiff took without objection as to the condition in which he then was, and gave up his note to the defendant. The plaintiff below, afterwards, brought the present action to recover damages, on the ground that the horse, when returned, was not in as good plight as when sold, and obtained judgment.

*Per Curiam.* As the deterioration, in the value of the horse, was not on account of any *secret* injury, and as the plaintiff below voluntarily took back the horse, and delivered up the note to the defendant, without any objection or reservation, as to the condition in which the horse then was, the law holds the plaintiff concluded by that act, because he thereby rescinded the contract of sale unconditionally.

If he had, then, set up the claim which he now attempts to enforce, the defendant might have chosen to keep the horse, and abide by the first contract, which he had a right to do.

Injustice has been done, and the judgment ought to be reversed.

Judgment reversed.

[ \* 220 ] \*WILLIAM SHELDON *against* JEMIMA SHELDON and others, Executors of JOSEPH SHELDON, deceased.

Where *A.* confesses a judgment to *B.*, and *B.* covenants to sell the property of *A.* under that judgment, and apply a sufficiency of the proceeds to the payment of *A.*'s debts, and account with him for the remainder, *B.* may himself become a purchaser at a sale under an execution issued on such judgment; for the legal and equitable title in the property remaining in *A.* until the sale, *B.* is not a trustee as to that property; nor is *B.* accountable to *A.* beyond the sum for which the property was sold to him. (a)

THIS was an action of covenant, which was tried at the *Albany* circuit, in *April*, 1815, before Mr. Justice *Platt*.

The action was founded on the following instrument, under seal, executed by the defendants' testator: "Whereas *William Sheldon* is indebted to me in the sum of one hundred and twenty-five dollars, and whereas the said *William* hath this day duly executed to me a bond, and warrant of attorney to confess judgment thereon, which bond is in the penal sum of eight thousand dollars, conditioned for the payment of four thousand dollars; and whereas it is agreed that under that judgment I shall sell all the real and personal property of the said *William*, and apply a sufficiency of the moneys arising therefrom to the payment of all his honest debts, and account with him the said *William* for the remainder thereof: Know, therefore, all men by these presents, that I the said *Joseph* do covenant, promise, and agree to and with the said *William*, that I will well and faithfully, on my part, keep and perform the before-recited agreement; and to insure a faithful performance thereof, I bind myself, my heirs, executors, and administrators, and each and every of them, in the penal sum of four thousand dollars, to him the said *William*, his heirs, executors, administrators, and assigns. In witness," &c. The breaches specially assigned on this covenant were,

(a) Vide *Rogers v. Rogers*, 3 *Wendell's Rep.* 503. *Davoue v. Fanning*, 2 *Johns. Ch. Rep.* 252, the chancellor's elaborate opinion.

that the defendants' testator had not applied a sufficiency of the money arising from the sale of the plaintiff's estate to the payment of his honest debts; and that the testator, or his executors, had not accounted with the plaintiff for the money arising from the sale of the plaintiff's real and personal property remaining in their possession after paying all his honest debts.

NEW-YORK,  
May, 1816.

SHELDON  
V.  
SHELDON'S  
EXECUTORS

Judgment was duly entered on the bond and warrant of attorney, mentioned in the covenant, and an execution being issued thereon to the sheriff of *Rensselaer*, the property of the plaintiff, which was situated in that county, was sold fairly, and without collusion, to the defendants' testator, as the highest bidder, for about the sum of 1,200 dollars; and the testator paid the honest debts of the plaintiff to more than 1,500 dollars. The plaintiff offered to prove that at the time of the execution of the covenant, and of entering the judgment, the plaintiff owned property of the value of 4,000 dollars; but the evidence was objected to on the ground that the only proper inquiry was for what the property sold under the execution, and the judge, being of that opinion, rejected it. The plaintiff next offered to prove, that the testator, after the purchase at the sheriff's sale, had sold part of the property at a much higher rate than he gave for it, with the proceeds of which he had paid the honest debts of the plaintiff above mentioned; but the judge ruled that the testator was not bound to account to the plaintiff beyond the amount for which the property sold under the execution. The plaintiff submitted to a nonsuit, with leave to move the Court to set it aside, and grant a new trial.

[ \* 221 ]

*S. A. Foot*, for the plaintiff, contended, that the defendants' testator, being a trustee, could not, himself, become a purchaser. It is a settled principle in equity, that if a trustee become a purchaser of the trust estate, the *cestuy que trust* has a right to set aside the sale, and have the property resold. Should it be said that this was a *judicial* sale, it may be answered that the trustee cannot avail himself of the benefit of such sale, for he can derive no profit or advantage whatever from his trust; and if it is for the interest of the *cestuy que trust*, a Court will always avoid the sale.†

The only question is, whether the plaintiff can avail himself of this principle in a Court of law. The testator, by his covenant, stipulated to perform certain duties as a trustee, and he is here called upon to answer for a breach of that covenant, or, in other words, for a violation of his trust. In a Court of equity, the *cestuy que trust* might either set aside the sale, or call on the trustee to account for the profits. Now, the trustee, in this case, has purchased, for 1,500 dollars, property worth 4,000 dollars, and he is called on to account, or pay the difference. The inquiry, as to the value of the property, at the trial, was, in this view, proper.

† *Campbell v. Walker*, 5 Vesey, 678. *Whitchell v. Lawrence*, 3 Vesey, 740. 13 Vesey, 609.

*Bliss*, contra, contended, that, by declaring for a breach of the

NEW-YORK,  
May, 1816.

SHELDON  
v.  
SHELDON'S  
EXECUTORS  
[ \* 222 ]

† 11 Johns.  
Rep. 446.

† 1 Cruise's  
Dig. 551, 552.

covenant, in this case, the plaintiff affirmed the sale. This is distinguishable from the ordinary case of a sale and purchase by a trustee. No third person was ever interposed in this case. It was a judicial sale, by the sheriff, the public law officer, so that all idea of collusion or fraud is excluded. Indeed, the parties, by their contract, contemplated a sale by a sheriff. In *Jackson, ex dem. Gillespie, v. Woolsey*,† the Court said that a guardian, at litem, might purchase the estate of the infant, sold by the commissioners for making partition. And in *Davison v. Gardner*,‡ Lord Hardwicke said, a trustee might purchase at open sale, at auction, before the master. (a)

[ \* 223 ]

THOMPSON, Ch. J., delivered the opinion of the Court. The first question which arises upon the motion to set aside the nonsuit granted in this case is, whether the testator, *Joseph Sheldon*, could legally purchase the property sold under the execution, in his favor, against the plaintiff in this cause. The objection which has been urged against this right is, that he was a trustee for the plaintiff, of the property sold, and, therefore, disqualified from becoming a purchaser. It would be a sufficient answer to this objection, that it forms no part of the breaches assigned in the declaration. But it is not true, in point of fact, that the testator stood in the character of trustee to the plaintiff. Neither the legal nor equitable title to the property was transferred to him. It remained entirely in the plaintiff, and was under his absolute control until the sale made under the execution. The testator only covenanted that he would sell the property under the execution, to be issued upon the judgment confessed, and apply a sufficiency of the money arising there-

(a) This is a manuscript case, decided July 21, 1743. The position of Lord Hardwicke is not supported by subsequent adjudications, nor by the reason and policy of the general rule relative to the incapacity of a trustee to purchase the trust estate. It does not depend on the sale being public or private, or whether it is advantageous or not to the trustee. The principle rests on a deeper and broader foundation. It is the danger of temptation from the facility and advantages afforded by the situation, that creates the disability. "The wise policy of the law," say the learned counsel, in the case of the *York Buildings v. McKenzie*, (8 Bro. P. C. 63., Appen. 1.) "has, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger, which lies in that situation." (See, also, *Ex parte James*, 8 Vesey, 343.) "No trustee," says Lord Eldon, in *Ex parte Lacey*, (6 Vesey, jun., 625. n.) "shall buy the trust property, until he strips himself of that character, or, by universal consent, has acquired a ground for becoming a purchaser." And in the case *Ex parte Bennet*, (10 Vesey, 385.) he again observes, that "if a trustee can buy, in an honest case, he may in a case having that appearance, but which, from the infirmity of human testimony, may be grossly otherwise." (See, also, *Whitchote v. Lawrence*, 3 Vesey, 740. *Campbell v. Walker*, 5 Vesey, jun., 678. *Sugden's Law of Vend.*, (2d edition,) 391—401. 1 *Maddock's Chan.* 91—93.) This subject was discussed in the case of *Bergen and others v. Bennet*, (1 *Caines's Cases in Error*, 1—21.) and *Kent, J.*, who delivered the opinion of the Court of Errors, says, "It is a sound and established rule of equitable policy, that a trustee cannot himself be a purchaser of the trust estate, without leave from chancery; and the reason of the rule is, to bar more effectually every avenue to fraud. This rule was recognized by this Court in the case of *Munroe and others v. Allaire*," (1796.) And after taking notice of some distinctions taken in that case, he says, "admitting the rule to be absolute and universal, still it is agreed that the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard." (See, also, *Manning v. Manning*, 1 Johns. Chan. Rep. 533.) So Lord Loughborough, in *Whitchote v. Lawrence*, and Lord Alvanley, in *Campbell v. Walker*, without considering the purchase by a trustee as, *ipso jure*, void, say, that he always purchases subject to the equity of having the sale set aside, if the *cestui que trust*, in a reasonable time, choose to say he is not satisfied with it.



from to the payment of the plaintiff's honest debts, and account to him for the remainder. Under such circumstances there could be no possible objection to the testator's becoming a purchaser, at a public sale made by the sheriff. And, indeed, it may well be questioned, whether the rule applies at all to such public sales, there being no chance of practising any fraud upon the *cestuy que trust*, by purchasing the property under its real value. (11 *Johns. Rep.* 455.) (a) But the rule itself is not as broad as was contended for by the plaintiff's counsel. In *Whichcote v. Lawrence*, (3 *Ves. jun.* 750.) the lord chancellor says, the rule is laid down, not very correctly, in most cases where you find it. It is stated as a proposition, that a trustee cannot buy of the *cestuy que trust*; certainly, says he, that naked proposition is not correctly true; the real sense of the proposition is not that the sale is, *ipso jure*, null, but that he who undertakes to act for another, in any matter, shall not, in the same matter, act for himself. Therefore, a trustee to sell, shall not gain any *advantage* by being himself the person to buy. And, in *Davison v. Gardner*, (cited 1 *Cruise*, 551.) Lord *Hardwicke* said, the Court of Chancery will not suffer a trustee to purchase the estate of the *cestuy que trust*, during his minority, though the transaction be fair and honest; but that the rule against trustees purchasing did not extend to trusts for persons of full age. And where there is a decree for sale of the *cestuy que trust's* estate, and an open bidding before the master, then the Court has permitted the trustee to purchase; for that is an open auction of the estate.

The next question is, whether the testator was bound to account to the plaintiff for more than the amount produced by the auction sale. The decision of this point is, necessarily, involved in the answer given to the first question. For, if the testator might legally become a purchaser at the auction, the avails of the sale thus made must be the amount for which the testator was accountable; and the plaintiff can surely have no reason to complain of such sale, as it was made according to his own agreement and stipulation. The *\*covenant* upon which the present action is founded provides, that the real and personal estate of the plaintiff should be sold under the judgment; and if that was a fair *bona fide* sale, which, indeed, has not been at all questioned, there can be no ground for calling on the defendants to account for more than the avails of such sale. And the case shows, that the testator did apply such avails to the payment of the plaintiff's debts, as by the covenant he was authorized and required to do. There has, therefore, been no breach of the covenant, and the plaintiff was properly nonsuited. The motion must, accordingly, be denied.

Motion denied.

NEW-YORK,  
May, 1816.

SHELDON  
V.  
SHELDON'S  
EXECUTORS

[ \* 224 ]

(a) *Vide*, as to this point, *Danoue v. Fanning*, ubi *supra*.

NEW-YORK,  
May, 1816.

BARNEY  
v.  
DEWEY.

In an action on the case for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was, afterwards, evicted by the rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving from the plaintiff to the defendant, or the price paid, as that is only a matter relating to the liquida-

[ \* 225 ]  
tion of dam-  
ages. (a)

Even in the case of a gift, the donor would be liable for a false affirmation as to the title.

A recovery from the vendee by the rightful owner, is conclusive evidence against the vendor.

If the declaration state, that the vendor gave evidence on the trial of the suit, in which such recovery was had, in favor of the true owner of the chattel, this is tantamount to an averment of notice of the pendency of the suit. (b)

### BARNEY against C. DEWEY.

THIS was an action of trespass on the case. The declaration contained one count, in which it was stated, that the defendant, on the 1st of July, 1811, at the town of *Fort Ann*, in the county of *Washington*, intending to deceive and defraud the plaintiff, did encourage him to buy a certain bay horse, then in the possession of the defendant, of the value of 150 dollars, and falsely, &c. affirmed that the said horse belonged to him, the defendant, and that he had a right to sell and dispose of him as his own, and thereby caused the plaintiff to purchase the said horse, which the defendant delivered as his horse; and that the plaintiff, confiding in the defendant's affirmation, purchased the said horse of him, the said defendant, and satisfied him therefor; whereas, in truth, at the time of said affirmation and delivery, the defendant was not owner of the said horse, and had no right to sell him, but the horse belonged to one *Thadeus Dewey*, and the defendant well knew the same; and that the said *Thadeus Dewey*, afterwards, brought an action of trover in the Common Pleas of the county of *Washington*, against the plaintiff, for the value of the said horse; that the plaintiff retained an attorney and two counsel to defend the same; but that, at the May term of the said Court of Common \*Pleas, the said *Thadeus Dewey* recovered against the plaintiff 113 dollars and 80 cents damages, and 89 dollars and 16 cents costs and charges, which sums of money the plaintiff has paid and satisfied; that the plaintiff procured the attendance of several witnesses at the said trial; and that the defendant did then swear, in behalf of *Thadeus Dewey*, that the horse did, at the time of delivery, belong to *Thadeus Dewey*, and that he, the defendant, had no right to part with him; by reason of which testimony, the jury found a verdict against the plaintiff. By reason of which false, &c. assertion and affirmation, &c.

To this declaration the defendant demurred, specially, and showed for causes of demurrer, first, Because it is alleged that the defendant caused and procured the plaintiff to buy the said horse, by affirming that the said horse belonged to the defendant, without setting forth the contract between the parties, or any consideration moving the plaintiff to buy of the defendant. Second, That no contract was set forth, or that the plaintiff gave the defendant any valuable consideration. Third, Because the plaintiff hath founded his right of action upon the fact of an action brought against him by one *Thadeus Dewey*, for the value of the horse and his recovery thereof. Fourth, Because the plaintiff hath spread upon the record the proceedings in the action against him by *Thadeus Dewey*, and the testimony given by the defendant therein.

(a) *Gallager v. Brunel*, 6 Cow. Rep. 346. *Allen v. Addington*, 7 Wendell's Rep. 9.

(b) *Corwin v. Davison*, 9 Cowen's Rep. 22.

The plaintiff joined in demurrer.

*D. Russel*, in support of the demurrer. He cited *Cro. Eliz.* 292. *Hob.* 69. 77. 41. *Cro. James*, 533. 1 *Cro.* 79. 144. *Doug.* 620. 9 *Johns. Rep.* 291.

NEW-YORK,  
May, 1816.

BARNET  
v.  
DEWEY.

*Skinner*, and *Z. R. Shepherd*, contra. They cited 2 *Term Rep.* 345. 5 *Term Rep.* 143. 2 *Wils. Rep.* 319. *Lord Raym.* 909. *Powell on Contracts*, 344, 345. *Rob. on Frauds*, 116. 1 *Camp. N. P. Rep.* 242. 2 *Johns. Rep.* 550. 1 *Chitty's Pl.* 332. 386. 1 *Johns. Rep.* 517. 3 *Term Rep.* 51. 6 *Johns. Rep.* 181. 2 *Caines's Rep.* 216.

SPENCER, J., delivered the opinion of the Court. The defendant has demurred, specially, to the declaration, for three causes; 1st. That it does not set forth the contract between the parties; 2d. That it does not state any consideration moving from *Barney* to buy the horse of *Dewey*; 3d. That the plaintiff \*founds his right of action on the recovery had against him by a third person; and 4th. Because the declaration contains the evidence of facts, and not the facts themselves.

[ \* 226 ]

None of the objections are well founded. The declaration is not very technically drawn, but it contains every essential requisite: it is a mistake to suppose that the action is founded on a contract; it is for a fraud. Fraud, or deceit, accompanied with a damage, is a good cause of action; and the late Ch. J. said, (in *Upton v. Vail*, 6 *Johns. Rep.* 182.) that this is as just and permanent a principle as any in our whole jurisprudence. It was not requisite to set forth the contract between the parties, or any consideration: it is enough to state the fraud and deceit, and the damages.

Had the defendant given the horse to the plaintiff, affirming him to be his, and had the plaintiff been, afterwards, prosecuted for the horse, and subjected to costs and damages, he might have maintained an action for the fraud and damage.

The fact of a recovery in the action against the plaintiff, by *Thadeus Dewey*, on the ground that the horse was not the property of the defendant, was not only a proper averment in the declaration, but it would be conclusive against the defendant, if proved. (*Blasdale v. Babcock*, 1 *Johns. Rep.* 517.) There is no allegation of notice to the defendant of the pendency of the suit brought by *Thadeus Dewey*, but there is an averment of a fact tantamount. It is alleged, that the defendant was a witness on that trial, and proved, himself, that he did not own the horse when he sold him to the plaintiff. With respect to the omission to state the price paid for the horse, it is only a matter relating to the liquidation of damages; and it is a principle that, after showing a right to damages, it is matter proper for the jury, and is not necessary to be shown to the Court in the first instance. (1 *Chitty's Pl.* 296.)

NEW-YORK,  
May, 1816.

Louw  
v.  
DAVIS.

I perceive no substantial, or even formal, objection to the declaration.

Demurrer overruled

[ \* 227 ]

\*Louw against DAVIS.

If the plaintiff, on trial, waive any particular cause of action, and afterwards bring a new suit for the same cause, the record in the former action is not a bar to the new suit. (a)

A *venire*, in a justice's Court, must be executed by a constable of the town from which the jury is summoned, and in which the cause is tried.

But it seems that a *venire* directed to any constable of the county, if executed by the proper constable, is a mere defect in form, for which the judgment will not be reversed.

IN ERROR, on *certiorari* to a justice's Court. *Davis*, the plaintiff in the Court below, brought an action against *Louw*, the defendant below, for negligence in not defending a suit brought against him, the plaintiff, in the Court of Common Pleas of *Seneca* county. A *venire* was issued in the cause, directed to any constable of the county, and was executed by a constable of the town of *Ovid*, but the jurors were taken from the town of *Romulus*, where the cause was tried. There was a challenge to the array, which was overruled by the justice. The defendant pleaded a former trial for the same cause of action, and judgment in his favor. From the record produced in evidence, it appeared that the former action was for the same cause, but that the plaintiff therein withdrew all his demands, except one for five dollars, for a fee in the suit, which the defendant was employed to defend. There does not appear to have been any decision, by the justice, as to the effect of the record as a bar. A verdict was given for the plaintiff below.

*Per Curiam.* With respect to the effect of the former trial, there appears to have been no decision made by the justice; and it might be fairly inferred from this circumstance, that the defence on this ground was not persisted in; but there could be no objection to the plaintiff's waiving any claim for the negligence: this was a distinct cause of action, and founded in *tort*. The other objection, however, is fatal. The statute requires the *venire* to be directed to a constable of the city or town where the cause is to be tried, commanding him to summon, &c. The direction of a *venire* is different from that of a summons and execution: these are directed to any constable of the county. Perhaps the mere direction of the *venire* might have been considered matter of form, if it had been served by a constable of the town where the cause was tried: this the act seems to require; probably because constables of the town are more likely to be acquainted with persons who are fit and proper jurors. But, whatever may have been the reason for such a provision, it is too plain and explicit to admit of any other construction. The judgment must, therefore, be reversed.

[ \* 228 ]

Judgment reversed.

(a) Vide *Manny v. Harris*, 2 Johns. Rep. 24. *Phillips v. Berick*, 16 Johns. Rep. 157. *Gardner v. Buckbee*, 3 Cowen, 120.

KILLMER *against* CRARY.IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error, who was the defendant in the Court below, having, on the return of the summons, obtained an adjournment, appeared, on the day to which the cause was adjourned, by attorney, and requested another adjournment on account of the absence of material witnesses. The application was opposed by the plaintiff below, and one of the grounds of opposition was, that the attorney could not make the affidavit that the witnesses were material; upon which the attorney stated that the defendant was sick and could not attend. The justice examined a witness as to that fact, and concluded, from what the witness stated, that the defendant could have attended, and refused the affidavit of the attorney. The parties then proceeded to trial, and a verdict was found for the plaintiff below, the defendant in error.

*Per Curiam.* The only question in this case is, whether the justice ought to have received the affidavit of the attorney, as to the absence and materiality of the witnesses. This was, in some manner, a matter resting in the sound discretion of the justice; and from the evidence returned, as to the inability of the defendant to attend the Court, we cannot say that there was such an abuse of this discretion as to justify the setting aside the judgment. It is clear that the defendant might have attended Court. The cause of his inability alleged, was a complaint in his face, arising, as the witness at first supposed, from intoxication; afterwards he thought it was occasioned by poison; he had but a day or two before walked ten miles. As the first adjournment was at the request of the defendant, and, for any thing that appears, for as long a time as he wanted in order to prepare for the trial, \*and as the dispensing with the affidavit of the party himself was a question proper for the justice, and resting in sound discretion, we think the judgment must be affirmed.

Judgment affirmed.

NEW-YORK  
May, 1816JACKSON  
v.  
HAVILAND.

The admission of the affidavit of any other person than the party himself, for the purpose of obtaining a second adjournment, on account of the absence of material witnesses, rests in the sound discretion of the justice; and if it do not appear that that discretion has been abused, his judgment will not be reversed.

[ \* 229 ]

JACKSON, *ex dem.* BEEKMAN and others, *against*  
HAVILAND.

THIS was an action of ejectment for land in *Queensbury*, in the county of *Washington*, which was tried at the *Washington* circuit, in *June*, 1813.

The plaintiff claimed under the patent of *Kayaderoseras*, to *John Tatham*, and 12 others, dated *November 2*, 1708. The

of entry under that judgment is altogether gone; and if there have been an adverse possession for 20 years, during which such judgment was recovered, it will not avail him to take the case out of the statute of limitations.

Where a person, having recovered a judgment in ejectment, neglects to enforce it within the period laid in his demise, his right

NEW-YORK,  
May, 1816.

JACKSON  
v.  
HAVILAND.

share of *John Tatham* passed, by his will, to his wife, *Mary Tatham*, who, on the 13th of *October*, 1715, conveyed the same to *Elias Boudinot*, who, on the 1st of *March*, 1717, conveyed to *George Clark*, from whom it descended to his heir, *George Clark*, the younger, prior to the year 1768. On the 14th of *March*, 1768, *George Clark*, the younger, conveyed the same to *Dirck Lefferts* and *Peter Remsen*; in 1771, partition was made of the patent of *Kayaderosseras*, by which it appeared that lot No. 13, in the 25th allotment, fell to the share of *John Tatham*; and by deed of partition between *Lefferts* and *Remsen*, dated the 18th of *May*, 1771, lot No. 1, in the subdivision of lot No. 13, was conveyed to *Lefferts*, in severalty, of whom the lessors of the plaintiff are the heirs at law. The defendant was in possession of about one hundred acres in lot No. 1, of lot No. 13, in the 25th allotment of the *Kayaderosseras* patent.

In 1788, or 1789, one *John Eddy* was in possession of the premises in question, on whom, as tenant in possession, a declaration in ejectment was served, in which *Dirck Lefferts* was the lessor of the plaintiff. A default was entered therein against the casual ejector, on the 7th of *May*, 1790. The demise in the declaration was laid on the 10th of *May*, 1788, for fourteen years, and the judgment was signed on the 27th of *May*, 1811.

[ \* 230 ]

\*The defendant claimed the premises under the patent of *Queensbury* to *Jacob Haviland*, and others, dated the 20th of *May*, 1762; and by a partition of the patent, dated in *November*, 1762, lots No. 102 and 42 were conveyed to *Jacob Haviland*. In 1765, *Asaph Putnam* took possession of lot No. 102, containing 250 acres, (of which the premises claimed by the plaintiff, as within the *Kayaderosseras* patent, are part,) under *Jacob Haviland*, and continued in possession twelve years, until 1777, when he was driven off, with the rest of the inhabitants, by the invasion of *Burgoyne's* army. Whilst *Putnam* was in possession, he built a log house and barn; there were 150 acres enclosed, and 40 or 50 acres cultivated. *Abraham Wing* succeeded to the possession, under a lease from *Haviland*; and *Henry Martin* next came into possession, in *September*, 1784, under a lease from *Moses Sage*, the son-in-law and agent of *Haviland*, and continued until *April*, 1787, when *John Eddy* came into possession. On the 6th of *July*, 1786, *Haviland* conveyed all his right in the *Queensbury* patent to *Moses Sage*, and *Sage*, on the 14th of *July*, 1787, conveyed lot No. 102 to *John Eddy*, who, on the 6th of *November*, 1794, conveyed the same to the defendant.

The judge directed the jury to find a verdict for the defendant, which they, accordingly, did.

*J. Emott*, for the plaintiff, contended, that the effect of the recovery in the former action of ejectment, was to destroy the continuity of possession, and to give the title to the plaintiff for 14 years. If so, then there is no adverse possession on the

part of the defendant. The former ejectment related to the same property, and was against *Eddy*, under whom the defendant holds. That judgment gave the plaintiff, as against *Eddy* and those claiming under him, a term of 14 years from 1790. If a single link in the chain of possession be broken, the whole effect of it is defeated, as it regards the statute of limitations, and there must be a new commencement of possession. Though the record was not made up until long after, owing to the negligence of the plaintiff's attorney, the judgment could not be considered as abandoned.

A judgment of a Court, directly on a point before them, is a conclusive bar. The merits of it can never be overhauled, except \*by writ of error.† In proceedings *in rem*, or real actions, the judgment is conclusive on the right of property.‡ For example, a judgment by default, in a *common recovery*, vests the property absolutely in the common recoverer.§ A recovery in an action of ejectment, by default, or after verdict, is the same thing; it is now a proceeding *in rem*, the thing only, the term, being recovered, not the mesne profits.||

After judgment in ejectment the plaintiff may enter.¶ He may, before a writ of possession is executed, maintain an action for the *mesne profits*. He may, before possession, sell his right, without being guilty of champerty. In an action for the *mesne profits*, the recovery in ejectment is conclusive as to the right of possession. So that, in the eye of the law, the judgment gives to the plaintiff the possession itself.††

*Skinner* and *Woodworth*, contra, insisted, 1. That the plaintiff had not shown a title. When *Clark* conveyed to *Remsen* and *Lefferts*, and when *Remsen* conveyed to *Lefferts*, *Putnam* was in possession, claiming under the *Queensbury* patent. The deeds, therefore, were void for champerty.‡‡

2. If the lessors of the plaintiff ever had a legal title, it is lost by the adverse possession of those under whom the defendant claims for more than 20 years. It is admitted that there has been no actual possession by the plaintiff's lessors for above 40 years. To prevent the operation of the statute of limitations, there must be an actual entry, so as to destroy the continuity of possession.§§ There must be an actual entry within the 20 years. The confession of lease, entry, and ouster, when there has been a nonsuit, will not prevent the operation of the statute. Where the statute once commences to run, it is not prevented by any intervening circumstance, as bankruptcy, coverture, &c.|||

In an action for *mesne profits*, the plaintiff must show that the writ of possession has been executed, or that he has obtained the actual possession.¶¶ After a judgment by default, the practice is to produce the judgment, and prove the writ of possession executed.††† It is true, where the defendant has appeared, and confessed lease, entry, and ouster, that is not ne-

NEW-YORK,  
May, 1816.

JACKSON  
v.  
HAVILAND.

[ \* 231 ]

† 2 Burr. 1009  
Co. Litt. 39. a  
106. a.

‡ Booth. 71. 2  
Bl. Rep. 361.

§ 2 Bl. Com  
357.

|| Goodtitle v.  
Tombs, 3 Wils.  
Rep. 118—120.

¶ 1 Burr. 88.

†† 1 Johns.  
Cas. 283. 1

Burr. 88, 89. 2

Burr. 668. 3

Johns. Rep. 483.

9 Vin. Ab. 353.

pl. 3. 1 Salk.

258. 3 Wils.

120. Rurn. on

Eject. 400.

††† 1 Johns.

Rep. 345. 9

Johns. Rep. 57.

§§ 4 Johns.  
Rep. 390.

||| Esp. Dig.  
148. 1 Str. 556.

1 Johns. Rep.

176. 3 Mass.

Rep. 263. 3

Binney's Rep

385.

¶¶ 2 Burr

665.

††† Rurn. on

Eject. 157. 2

Cromp. Pr. 222.

NEW-YORK,  
May, 1816.

JACKSON  
v.  
HAVILAND.

[ \* 232 ]

† *Bull. N.*  
*P. 87. 1 Impoy's*  
*Pr. 428. 2 Sel-*  
*lon, 225.*

‡ *3 Johns. Rep.*  
*481.*

§ *2 Johns. Rep.*  
*369. 11 Johns.*  
*Rep. 461.*

|| *3 Caimes's*  
*Rep. 197.*

cessary; but in case of a judgment by default, which is the present case, the writ of possession executed must be produced.† It would be absurd to allow the plaintiff, in an action of trespass, to recover without showing an actual possession.

\*In *Baron v. Abeel*,‡ and in *Benson v. Matsdorf*,§ the defendant, after the recovery, had surrendered the possession.

If the plaintiff had taken possession under the judgment, still the defendant might, the next day, have brought his action to recover back the possession. If there were no previous title in the lessors of the plaintiff, what is to be the effect of the judgment?

In *Jackson, ex dem. Frost, v. Horton*,|| in which the limitation of five years, under the act of the 28th of March, 1795, was set up in bar after the ejectment, the defendant died before trial, and after the five years had expired, and another action was immediately brought; though the question was not decided, the Court being equally divided, yet two of the judges (*Livingston, J.*, and *Spencer, J.*) were of opinion, that the act was to be taken according to its terms, and that the plaintiff could not recover; the other judges thought the case within the spirit and equity of the exceptions.

The 3d section of our statute (*sess. 24. c. 183.*) (a) declares, that no entry shall be made on lands, but within 20 years after the title accrued; and that no claim, or entry, shall be sufficient, within the meaning of the act, unless an action shall be commenced thereon, within one year after making the entry, and prosecuted with effect; and, by the 5th section, in case of the reversal of a judgment, the plaintiff must commence a new action within one year after the reversal. It seems to be the meaning of the act, that the suit should be commenced in one year, its object being to make parties vigilant in regard to their rights. Here there was a lapse of 22 years before the suit was brought.

*Emott*, in reply, said that the statute of champerty did not apply to this case.

Again; the earliest commencement of adverse possession was in 1765; from that time to 1790, when the ejectment was commenced, deducting seven years for the period of the revolutionary war, there were only 18 years. The demise was laid in 1788, for 14 years, and, until after the end of that term, the statute would not begin to run. It makes no difference that the judgment was not perfected, or roll signed, until 1811. The roll is only evidence of the judgment by default, in 1790.

[ \* 233 ]

\*The books of practice, it is true, differ as to the necessity of executing a writ of possession, and the reason of the difference it is not easy to understand. The effect of a judgment by default is precisely the same as that of a judgment after appear-



ance. In the one case, the defendant, by his default, admits the right of the plaintiff. In the other, it is found for him by the verdict of a jury. After the term has expired, the plaintiff may bring his action for the mesne profits.

NEW-YORK,  
May, 1816.

JACKSON  
v.  
HAVILAND

PLATT, J., delivered the opinion of the Court. The plaintiff deduces a regular chain of title under the patent of *Kayaderosseras*, granted the 2d of November, 1708, to *John Tatham* and 12 others; and the defendant also shows a regular deduction of title under the patent of *Queensbury*, granted the 20th of May, 1762, to *Jacob Haviland* and others. Each of the patents (by reason of an interference) covers the premises in question. On this general view, the plaintiff claiming under the oldest patent, would, of course, be entitled to recover. But the defence is rested on two grounds; 1st, that the conveyance from *George Clark* to *Dirck Lefferts* and *Peter Remsen*, dated the 14th of March, 1768, under which the plaintiff derives title, was void as it regards the premises in question, by reason of an adverse possession.

2d. That the plaintiff's claim is barred by the statute of limitations.

In support of these objections, the defendant proved, that, on the 9th of November, 1762, a deed of partition was executed by the patentees of *Queensborough*, whereby lot No. 102, of that patent, (including the premises in question,) was released to *Jacob Haviland*.

The defendant further proved, that, in 1765, or 1766, *Jacob Haviland* put a tenant (*Asaph Putnam*) on that lot, containing 250 acres; that *Putnam* continued on the lot for 10 or 12 years, occupying and improving it as tenant under *Jacob Haviland*; and that the farm has ever since (with the exception of a few years during the war) been successively occupied by *Abraham Wing*, one *Martin*, *John Eddy*, and the defendant, under the title of *Jacob Haviland*; that there was a log house and barn built by *Asaph Putnam*, and 40 or 50 acres of the lot were cleared and reduced to cultivation before the revolutionary war.

\*On the part of the plaintiff, it is contended, that his title is protected from the operation of the statute of limitations, by the judgment in ejectment against *John Eddy*. It appears that, in 1788, or 1789, an ejectment suit was commenced in this Court for *Dirck Lefferts*, as lessor of the plaintiff, upon a demise of 14 years, from the 10th of January, 1788, against *John Eddy*, then in possession of the premises; that, in April term, 1790, a rule for judgment by default, against the casual ejector, was entered; and that, on the 27th of May, 1811, a judgment roll was entered up and signed in that suit, being nine years after the demise in the declaration had expired. The plaintiff must fall on both points.

The possession of *Asaph Putnam*, on the 14th of March, 1768, (the date of the conveyance to *Lefferts* and *Remsen*,) was

[ \* 234 ]

NEW-YORK,  
May, 1816.

JACKSON  
v.  
HAVILAND.

of the whole lot No. 102, in the allotment of *Queensbury* patent, containing 250 acres, as tenant under *Jacob Haviland*, one of the patentees of *Queensbury*. He occupied *exclusively*, under that title. No question had then arisen as to the interference of the patent lines of *Kayaderosseras* and *Queensbury*; and I think it would be absurd, as well as unjust, to consider *Putnam*, in 1768, as a tenant in common with *George Clark*. There existed between them no privity of contract or estate, and they claimed under separate and independent titles. I, therefore, consider it immaterial, whether *George Clark* attempted to convey the *whole title* in severalty, or only an *undivided share*; because no act which he could do towards *Lefferts* and *Remsen*, could change the character of *Putnam's* possession. If that possession were *adverse* against the *whole title* of *Kayaderosseras*, it must be equally so against an undivided share of that title. I am, also, clearly of opinion, that the proceedings and judgment in the ejectment suit against *John Eddy* afford no support to the plaintiff's title.

The action of ejectment is only a *possessory remedy* in favor of a person having a right of entry; it does not establish and conclude the question of title, as in real actions.

It is true, the lessor in ejectment may enter after judgment, without a writ of possession; and the judgment is evidence of his right of entry, as between the parties and privies, so as to protect him against an action of trespass, *so long as the effect of the judgment continues*. But here the lessor of the plaintiff has waived his right of entry under the judgment against *Eddy*, and \*has slept until the term of the demise has expired; and, I think, he now stands in the same relation to the defendant as if he had never attempted a legal remedy by the former suit.

[ \* 235 ]

In the case of *Aslin v. Parkin*, (2 Burr. 667, &c.) Lord Mansfield says, "A judgment in ejectment, like all others, only concludes the parties as to the subject matter of it; and therefore, beyond the time laid in the demise, it proves nothing at all."

A party having title may enter *peaceably*, without the aid of the law; that is, without judgment or suit; and having so entered without force, his possession enures according to his title. The remedy, by ejectment, is intended merely to enable a party having title to enter, *by force*, under a writ of possession, which he could not lawfully do without such writ. In this case, there has been no *actual entry* with, or without, writ of possession. The lessor of the plaintiff might have availed himself of the arm of the law to put him in possession; but he neglected to do so, until the authority for that purpose expired; and he is now in the same predicament as if that authority had never existed.

I have no doubt, that the possession of the defendant, and those under whom he claims, has been *adverse* ever since its commencement. On every ground, therefore, the defendant is entitled to judgment.

IVES *against* IVES.NEW-YORK,  
May, 1816.IVES  
v.  
IVES.

THIS was an action of trespass, *quare clausum fregit*, for breaking and entering the dwelling-house of the plaintiff, and tearing out the doors and windows, and pulling down the oven and chimney of the house. The defendant pleaded, 1. Not guilty. 2. *Liberum tenementum*. 3. That the defendant committed the supposed trespass by the license of the plaintiff.

To the second plea the plaintiff replied, that, by a certain agreement, in writing, the defendant bargained and sold the premises to the plaintiff, and thereby agreed to give him a good and lawful deed of the same; by virtue of which agreement, the \*plaintiff was possessed thereof, and continued possessed thereof, until, &c. To the third plea the plaintiff replied, *de injuria sua propria*.

To the replication to the second plea there was a general demurrer, and joinder in demurrer, which was submitted to the Court without argument.

*Per Curiam.* According to the decisions in *Jackson, ex dem. Ludlow, v. Myers*, (3 Johns. Rep. 388.) and *Jackson, ex dem. Green, v. Clark*, (3 Johns. Rep. 424.) the agreement set forth in the plaintiff's replication, although containing words of bargain and sale, *in presenti*, imports, in law, nothing more than an agreement to convey, as an *executory contract*, and does not, *ipso facto*, transfer the title.

By the decisions in *Suffern v. Townsend*, (9 Johns. Rep. 35.) and *Cooper v. Stower*, (9 Johns. Rep. 331.) a contract to sell does not, in itself, contain a license to enter; or, at most, it gives an implied permission to occupy as *tenant at will* merely.

It is also well settled, that the person having title, that is, having a right to enter, is not liable, in an action of trespass, for entering with force, although liable to indictment for a forcible entry. *Wilde v. Cantillon*, (1 Johns. Cas. 123.) *Hyatt v. Wood*, (4 Johns. Rep. 150.) The defendant is entitled to judgment.

Judgment for the defendant.

(a) Vide the cases cited in note (a) to 3 Johns. Rep. 388.

(b) *Essex v. Olmsted*, 7 Cowen, 229.

(c) *Wm. Dickenson v. Jackson*, 6 Cow. Rep. 147.

An agreement to convey, containing words of bargain and sale *in presenti*, does not transfer the title. (a)

An agreement to sell land does not import a license

[ \* 236 ]

to enter, but, at most, gives an implied permission to occupy as tenant at will.

(b) If a person having title to land enter with force, he is not liable to an action of trespass. (c)

NEW-YORK,  
May, 1816.

KERR against SHAW and SHAW.

KERR  
v.  
SHAW.

A warranty  
in a writing not  
under seal, for  
the quiet enjoy-  
ment of land,  
must express

[ \* 237 ]

the considera-  
tion on which it  
is founded. (a)

A recovery  
in ejectment a-  
gainst the cov-  
enantee, is not  
a breach of the  
covenant for  
quiet enjoy-  
ment; but there  
must be an ac-  
tual ouster by  
writ of posses-  
sion. (b)

THIS was an action of *assumpsit*, founded upon a written agreement, dated the 9th of *December*, 1811, by which the defendants bound themselves to the plaintiff, in the penalty of one thousand dollars, as follows: that he, the plaintiff, "should have, and hold a peaceable possession of a certain farm, distinguished and known by lot No. 10, in great lot No. 23, in *Hardenburgh* patent, &c., which the said *Kerr* is to have possession \*of one hundred acres on the west part of said farm, and to possess the same peaceably, with paying the rent due thereon; whereby we warrant and defend against all and every person, except the lord of the soil. The conditions of the above are as such, that the said *Kerr* is to call on the lord of the soil, and take a lease in his own name, as soon as may be convenient, within the term of sixty days, then the above to be void, and of no effect."

The plaintiff proved at the trial, that the consideration of this agreement was 450 dollars, paid by the plaintiff, for which *William Shaw*, one of the defendants, on the same day, assigned to the plaintiff his right and title to the 100 acres of land described in the agreement. This evidence, being objected to on the part of the defendants, was admitted by the judge, reserving the point. The plaintiff, then, produced a judgment against *William Shaw*, in the Supreme Court, docketed in *March*, 1809, on which an execution was issued, and the land in question sold by the sheriff of *Greene*, on the 10th of *November*, 1810, and conveyed to *E. Williams*, who brought an action of ejectment against the plaintiff, and recovered judgment on the 6th of *November*, 1813; but the premises had never been yielded up, and no writ of possession had ever been issued. The plaintiff admitted that he had not called on the lord of the soil for a lease, as required by the condition annexed to the agreement.

The counsel for the defendants objected to the sufficiency of this evidence to entitle the plaintiff to recover. But a verdict was taken for the plaintiff, subject to the opinion of the Court. The case was submitted to the Court without argument.

*Per Curiam.* The agreement upon which this action is founded is very inartificially drawn, but it amounts, substantially, to a promise or warranty of quiet enjoyment, by the plaintiff, of the lot of land therein described, against all persons except the lord of the soil. But, according to the case of *Scars v. Brink*, (3 *Johns. Rep.* 210.) the contract is void under the statute of frauds. The agreement is not under seal, nor is there

(a) But the statute of frauds has made no variation in the common law in regard to writings under seal. In such no consideration need be expressed. *Livington v. Tremper*, 4 *Johns. Rep.* 416.

(b) Vide *Lansing v. Van Alstine*, 2 *Wendell's Rep.* 565, note. *Dyett v. Pendleton*, 4 *Cowen*, 581. S. C. 8 *Cowen*, 727. *Whitbeck v. Cook*, 15 *Johns. Rep.* 483.

any consideration expressed in the writing to support the promise; and in the case referred to, it is decided that the consideration, as well as the promise, must be in writing; and that parol evidence is not admissible to prove the consideration. But if this \*objection was removed, there is not enough shown to entitle the plaintiff to recover in this action. If the agreement is to be considered equivalent to a covenant for quiet enjoyment, no sufficient breach has been shown. This covenant is broken only by an eviction or *actual ouster*. It relates to the possession only, not to the title. There must, therefore, be a disturbance of the possession in order to amount to a breach of such a covenant. The case of *Waldron v. M'Carty*, (3 Johns. Rep. 471.) is very strong on this point. In that case the land, when sold and conveyed, was encumbered with a mortgage, which was, afterwards, foreclosed in chancery, and sold, and purchased in by the grantee in the deed; and this was held to be no breach of the covenant for quiet enjoyment. The same principle is adopted and confirmed by the case of *Korts v. Carpenter*, (5 Johns. Rep. 120.) where the Court say it is a technical rule, that nothing amounts to a breach of this covenant but an actual eviction or disturbance of the possession of the covenantee. In the case before us there is, to be sure, a judgment against the plaintiff, and nothing wanting but a writ of possession to constitute a breach of the promise. But this being a technical rule, applicable to this covenant, the covenantor ought not to stop short of an actual ouster, if he means to rely upon his covenant; he has no right to make any compromise until an actual breach has been shown. The defendants are, accordingly, entitled to judgment.

Judgment for the defendants.

### OLMSTED *against* C. STEWART.

IN ERROR, on *certiorari* to a justice's Court.

The suit in the Court below was on a promissory note executed by *Olmsted*, the defendant below, payable to *Enos Stewart* or bearer. *C. Stewart*, the plaintiff below, as agent of *E. Stewart*, had presented an order on the defendant for the amount \*of an account due *E. Stewart*, and for which it was alleged that the note in question was given. The defendant produced witnesses to prove that the order on which the note was obtained was a forgery; but the justice, from his own inspection, decided that the note was genuine. The defendant then offered to prove that, when he gave the note, he stated to the plaintiff

NEW-YORK,  
May, 1816.

OLMSTED  
V.

STEWART.

[ \* 238 ]

Where *A.* delivers a promissory note to *B.* as agent of *C.*, and *A.*, at the same time, states to *B.* that there

[ \* 239 ]

was not so much due *C.* as the amount of the note, to which statement *B.* makes no objection, and *B.*, afterwards, as holder of the

note, brings an action against *A.*, *A.* will be allowed to show what was really due from him to *C.*, and thus reduce the amount to be recovered by *B.*, who does not stand in the situation of an innocent holder of a note, taking it before it becomes due, in a regular course of business. (a)

(a) *Rumsey v. Leek*, 5 Wendell, 20. *Herrick v. Carman*, 12 Johns. Rep. 159.

NEW-YORK,  
May, 1816.

OSGOOD  
v.  
DEWEY.

that there was not as much due as he gave the note for; that he had mislaid his papers; that he would give the note, and let it lie until he could find his papers; and then offered to prove that there were only due *E. Stewart* 6 dollars and 80 cents, which he had tendered. The evidence was rejected, on the ground that the note became the property of the plaintiff before it fell due; and the justice gave judgment for the plaintiff below for the amount of the note.

*Per Curiam.* The judgment in this case is clearly against evidence, with respect to the hand-writing of *Enos Stewart* to the order. Two witnesses swore that they did not believe it to be his writing; and that he uniformly wrote his name *Steward*, instead of *Stewart*; and the only evidence opposed to this was the opinion of the justice from comparing this writing with other writing admitted to be genuine. Whether the judgment ought to be reversed, on this ground, may be questionable. But the testimony offered to show that there was not so much due *E. Stewart* as the amount of the note, ought to have been received. The plaintiff does not stand in the character of an innocent holder of a note, coming into his hands in the regular course of business, before it fell due. He took the note himself, and without making any objections to the statement made by the defendant; he must, therefore, be considered as receiving it subject to the examination to be made by the defendant, as to the state of the accounts between him and *E. Stewart*. The note must be deemed to have been given with this express understanding and reservation. If the note had been taken by the plaintiff himself, it would have altered the case. The judgment must, therefore, be reversed.

Judgment reversed.

[ \* 240 ]

\*OSGOOD *against* DEWEY.

An action for use and occupation lies where the holding is upon an implied as well as an express permission of the landlord.

A tenant who, after the expiration of, and payment of rent under, a parol demise, continues in possession without any

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action against the plaintiff in error, in the Court below, for use and occupation.

*Dewey*, the plaintiff below, demised, by parol, certain premises to the defendant below, for one year, ending the 31st of *December*, 1809, at the rent of 9 dollars, which the defendant paid, and continued in possession for three years, without any new agreement, and without paying rent. The action was brought to recover rent for those three years, and judgment was given for the plaintiff below.

new agreement with the landlord, cannot, in an action against him for the use and occupation of the premises, subsequent to the expiration of the former term, dispute the title of the plaintiff; and his subsequent holding will be deemed to have been by the implied permission of the original lessor. (a)

(a) *Fraserstonhaugh* ads. *Bradshaw*, 1 *Wendell's Rep.* 134. *Slusman v. Ballou*, 8 *Cow. Rep.* 304. *Abel v. Rudcliff*, *infra*, 297. *Bancroft v. Wardwell*, *infra*, 489.

*Per Curiam.* There can be no doubt that this action lies as well where the holding is upon an implied as upon an express permission of the landlord. The parol lease for the year 1809, and the payment of rent under it, are acts which estop the tenant from disputing the title of his landlord; and, although no new agreement was shown, in regard to the tenancy for the three last years, the continued possession of the tenant, holding over, is characterized by the previous lease, and must be deemed a holding by implied permission of the original lessor. (*Harding v. Crethorn*, 1 *Exp. Rep.* 57.) The judgment must be affirmed.

Judgment affirmed.

NEW-YORK,  
May, 1816.

CHIPMAN  
v.  
MARTIN.

### CHIPMAN *against* MARTIN.

THIS was an action of trespass on the case, brought on the 9th section to the act concerning distresses, (1 *R. L.* 436.) (a) to recover double damages for making a distress when no rent was due. The cause was tried before Mr. Justice Platt, at the *Washington* circuit, in June, 1815.

The defendant had, by deed, executed on the 11th of December, \*1809, granted certain lands in the town of *Hartford*, in the county of *Washington*, to *Chauncey Stewart*, in fee, reserving an annual rent of 93 dollars and 61 cents; the first payment of which was to be made on the 11th December, 1811, and on that day in each succeeding year, with power to the grantor to distrain in case of non-payment. The deed was, afterwards, assigned, by *Stewart*, to the plaintiff, who went into possession. A judgment was recovered in the Court of Common Pleas for the county of *Washington*, which was docketed on the 17th of March, 1813, by the defendant against *Stewart*, in an action of covenant, for 209 dollars and 74 cents. The breaches assigned were for the non-payment of all the rent due before the 11th of December, 1811. On or about the 26th of June, 1813, *Chauncey Stewart*, as bailiff of the defendant, distrained on the premises, and took property to the value of 250 dollars. *Stewart* was at the time, and had long been, insolvent.

It was a question on the trial, to which a considerable part of the evidence related, whether the plaintiff had sufficiently connected *Chauncey Stewart* with the defendant, as his agent, to render the one liable for the acts of the other; but the judge was of opinion that it was sufficiently made out; and, also, that the judgment in favor of the defendant, against *Stewart*, was an extinguishment of the rent charge, and that it was not necessary, in order to produce that effect, that the judgment should be satisfied. The jury, accordingly, found a verdict for the plaintiff for double the value of the property distrained.

A recovery on a covenant for the payment of rent is not, without actual satisfaction, an extinguishment of the rent, and the lessor may.

[ \* 241 ] notwithstanding such recovery, distrain for the rent in arrear.  
(b)

(a) 2 *R. S.* 504.

(b) Vide *Bank of Shenango v. Hyde*, 4 *Conn. Rep.* 567.

NEW-YORK,  
May, 1816.

CHIPMAN  
V.  
MARTIN.

A motion was made to set aside the verdict, and for a new trial.

*D. Russel*, for the defendant, contended, that the judgment against *Chauncey Stewart* was not an extinguishment of the right to distrain for the non-payment of the rent. The lessor has three remedies, all or either of which he may pursue, until satisfaction is obtained. It is analogous to the remedies possessed by a mortgagee. By the law, as it stood at the time judgment was obtained against *Stewart*, the action on the covenant was an inferior remedy to that by distress. That a subsequent remedy should merge or extinguish a previous one, it should be of a higher or superior nature.†

† 1 *Roll. Abr.*  
470, 471. 640. 1  
*Burr.* 9. 6 *Co.*  
[ \* 242 ]  
44. *Cro. Eliz.*  
304. 1 *Dall.* 413.

Again; even admitting that the security obtained by the judgment \*extinguished the remedy by distress, it cannot operate to extinguish the right. If the right remains, that is a sufficient protection against the 9th section of the act, (1 *N. R. L.* 436.) (a) on which this action is brought.

‡ 3 *East's*  
*Rep.* 251.

In *Drake v. Mitchell*,‡ one of three joint covenantors gave a bill of exchange for part of the debt, on which bill a judgment was recovered; but the judgment was held to be no bar to an action on the covenant against the three. Lord *Ellenborough* said, "A judgment recovered in any form of action, is but a security for the original cause of action, until it be made productive to the party; and, therefore, until then, it cannot operate to change any other collateral concurrent remedy which the party may have." The action of covenant, and the remedy by distress, are concurrent remedies.§

§ *Bantleon v.*  
*Smith*, 2 *Bin-*  
*ney's Rep.* 146.

*Skinner*, and *Cowan*, contra, contended, that the remedy by distress was extinguished by the judgment in the action of covenant for the rent; or that, at least, by that action, the lessor had determined his election, and could not proceed, afterwards, to distrain. The acceptance of a bond for a parol contract will extinguish that contract.|| So, if rent be reserved by deed, though giving a bond by the lessee for the rent will be no extinguishment of it, yet a judgment obtained on the bond will be an extinguishment of it. This doctrine is to be found in *Higgins's Case*,¶ and is laid down by *Buller*†† and *Woodfall*.‡‡

|| 3 *Johns. Cas.*  
180. 2 *Johns.*  
*Rep.* 471.

¶ 6 *Co.* 45.  
†† *Bull. N. P.*  
182.

‡‡ *Woodf.*  
*Tenant's Law*,  
412. 614.

§§ *Littleton, s.*  
222.

|| *Co. Litt.*  
144. b. 145. a.  
145. b.

¶¶ 1 *Chitty's*  
*Pl.* 214. 1 *Salk.*  
248. 1 *Ld.*  
*Raym.* 719.

So, if the grantee of a rent charge (and this is a rent charge) purchase part of the land, the rent charge is extinct.§§ If he resort to his personal remedy, by writ of annuity, he shall be held to his election, and cannot resort to his other remedy, by distress.||||

Suppose the party had taken his remedy by distress, in the first instance, could he, in case the cattle had escaped, have resorted to his action of covenant for the rent? The remedies are alternative, not cumulative.¶¶ Analogous to this is the clause of re-entry for non-payment of rent; where, if the lessor bring his action of covenant for the non-payment of the rent, he



waives his right of entry for the forfeiture.† A party cannot maintain two actions on the same contract, or instrument, but must make his election, and be bound by it. The case put of a bond and mortgage, is different; there are separate and distinct remedies, by distinct instruments, and operating differently. \*The point raised here was not decided in *Bantleon v. Smith*;‡ but the opinion of the Ch. J. is in favor of the plaintiff. He says, "Nothing is plainer than that a man cannot distrain for rent where no rent is due." Now, the rent being extinguished by the judgment, as rent, none is due; but the lessor has his *lien* on the land for the amount of the judgment. Instead of rent in arrear, for which he might distrain, he has a judgment debt which binds the land, and the payment of which may be enforced by execution. He has the land itself for his security, instead of a remedy by distress.

*Russell*, in reply, said, that the lease, in this case, contained a clause of re-entry for the non-payment of rent, in the usual form. The case of an annuity, cited from *Co. Litt.*, is distinguishable from the present. That was the grant of an annuity, or yearly rent, to a person, for which the land of the grantor was charged with power to the grantee to distrain. There the grantee had, also, at his election, the personal remedy by writ of annuity. But where land is granted, in fee, reserving rent, with a clause of distress, he cannot have a writ of annuity.

THOMPSON, Ch. J., delivered the opinion of the Court. This action is founded upon the 9th section of the act concerning distresses for rent, (1 R. L. 436.) (a) which declares, that if any distress and sale shall be made, for rent pretended to be in arrear and due, when no rent is in arrear or due, the party so distraining, or for whom such distress shall be made, shall be liable to an action on the case, by the owner of the goods distrained, who shall recover double the value of such goods.

The lease by which the rent in question is reserved, was given by the defendant to *Chauncey Stewart*, and by him assigned to the defendant. A judgment has been obtained, upon the covenant in the lease, against the original lessee, for the same rent for which the distress was made. But no execution has been issued upon this judgment, or satisfaction in any way obtained, and *Stewart* is insolvent. The principal question in the case is, whether this judgment does, in any manner, take away or impair the remedy by distress; and I am satisfied it does not. We must bear in mind, that the present action is to recover a penalty, and, of course, all the rules applicable to the construction of penal statutes are to be adopted. Under such \*rules of construction, it cannot be said that the rent was not due and in arrear; nothing short of actual payment, or satisfaction, will meet the good sense and sound interpretation of this statute. The doctrine of extinguishment does not apply to this case. The

NEW-YORK,  
May, 1816.

CHILFMAN  
v.  
MARTIN.

[ \* 243 ]

† *Running-  
ton on Eject.*  
80. *Crompton v.*  
*Munshul, M. S.*  
‡ 2 *Binney,*  
146.

[ \* 244 ]

(a) 2 R. S. 504.

NEW-YORK,  
May, 1816.

OVERSEERS OF  
HUDSON

V.  
OVERSEERS OF  
TAGHKANAC.

particular cause of action, for which a judgment is obtained, is extinguished or merged in such judgment. No action of covenant could be brought against *Stewart*, for the same rent for which the former judgment was obtained. If *Stewart* had still remained in possession, and the distress been made on his goods, the unsatisfied judgment would, in my opinion, have formed no obstacle to the legality of such distress; much less color is there for setting up a judgment against an insolvent, to discharge the present plaintiff from the rent. The principle which governed the decision of *Drake v. Mitchell*, (3 *East*, 258.) is very much in point. It is there held, that a judgment is but a security for the original cause of action, until it be made productive in satisfaction; and until then it cannot operate to change any other collateral concurrent remedy which the party may have. The judgment, if *Stewart* was solvent, could only be considered as additional security for, and not as satisfaction of, the rent; that still exists, and is due and in arrear. Like the case of a bond and mortgage, a judgment upon the bona will not preclude the mortgagee from bringing his action of ejectment, and recovering possession of the land. All the principles applicable to the case before us are noticed, and involved in the decision of *Bantleon v. Smith*, (2 *Binney*, 152.) which go fully to establish, that the defendant, in this case, had a double remedy for his rent; one upon the covenant in the lease, and one against the land; and that nothing short of actual satisfaction will discharge either. The direction of the judge to the jury, that the judgment against *Stewart* was an absolute payment and extinguishment of the rent, was incorrect, and a new trial must be granted, with costs to abide the event of the suit.

New trial granted.

[ \* 245 ]

\*THE OVERSEERS OF THE POOR OF THE CITY OF HUDSON *against* THE OVERSEERS OF THE POOR OF THE TOWN OF TAGHKANAC.

A binding by a voidable indenture, and a service under it for two years, gives the apprentice a settlement in the town in which he served; and it is not competent for the town to object to the validity of the binding. (a)

TWO justices of the peace of the town of *Taghkanac*, in the county of *Columbia*, had made an order for the removal of *Elizabeth Heydon* and her four children, paupers, from that town to the city of *Hudson*. From this order the overseers of the poor of the city of *Hudson* appealed to the Court of General Sessions of the Peace of the county of *Columbia*, which, at its session in *May*, 1814, confirmed the order of the justices. From the return to a *certiorari* to the Court of Sessions, the following facts appeared:

About forty years ago, one *Catreen Race*, an inhabitant of the

(a) Vide *Hamilton v. Eaton*, 6 *Cov. Rep.* 658. *Owasco v. Oswagatchie*, 5 *Id.* 527. *Guilderland v. Knox*, *Id.* 363.

town of *Livingston*, in the county of *Columbia*, charged one *Adam Heydon*, a freeholder and inhabitant of *Hudson*, with being the father of a bastard child with which she was then pregnant. *Heydon* married her, but refused to cohabit with her, and she continued to live in *Livingston*, and he in *Hudson*, where he still resides. Three months after their marriage, *Catherine Race* was delivered of a male black child, (both parties being white persons,) which *Heydon* refused to acknowledge. The child went by the name of *William Heydon*, and was, when about two years old, bound out by his mother, who alone signed the indenture, to one *Phillips*, a mechanic, and inhabitant of *Livingston*, until he should arrive to the age of 21. The child continued with *Phillips*, under the indenture, six years in the town of *Livingston*, and about twenty months more in that part of *Livingston* which is now *Taghkanac*, and then removed with his master into the state of *New-Jersey*, where he completed his term of service, and then returned to *Taghkanac*, where he married and died, leaving a widow and four children, the paupers in question.

Upon these facts the Court below decided that *William Heydon*, being born in lawful wedlock, was the child of *Adam Heydon*; that his residence followed his father's, and was, therefore, in *Hudson*; and that, having gained no legal settlement elsewhere, his widow and children were chargeable to *Hudson*. The admission of evidence as to the color of *William Heydon*, \*and his offspring, was objected to, but the objection was overruled by the Court below.

NEW-YORK,  
May, 1816.

OVERSEERS OF  
HUDSON

V.  
OVERSEERS OF  
TAGHKANAC.

[ \* 246 ]

*Bay*, for the plaintiffs in error, contended, that the fact of non-access by the husband, which was to be proved like all other facts, was sufficient evidence of the illegitimacy of a child born after marriage. So the fact of the child being black was, unless the laws of nature were reversed, equally strong to prove its illegitimacy.

Being illegitimate, the child follows the condition of the mother.

Here was no interference by the overseers of the poor, at the time the child was born, nearly 40 years ago. The husband refused to have any concern with it. The mother was obliged to support the child, and, if necessary, she might bind him to service. It is true that the contracts of a *feme covert* are void, as to all things in which the husband can have any interest. This case is peculiar. It is probable that such an instance never before existed. The husband denied that the child was his, and refused to interfere in the care of it. If the indenture was void, it was only as against him. If he assented to the indenture, the overseers of the poor could take no advantage of any informality in it. From his silence and acquiescence, his assent to the act must be presumed. The town can take no advantage of any defect in the indenture. It was so decided in the case

NEW-YORK,  
May, 1816.

OVERSEERS OF  
HUDSON  
V.

OVERSEERS OF  
'TAGHKANAC.

of *Rex v. The Inhabitants of St. Nicholas, in Ipswich*, reported in *Burr. Sett. Cases*, 91. case 28.

Again, under the colonial law, the settlement of the child followed the place of its birth.

*E. Williams*, contra, contended, that *William Heydon*, being born of the wife of *Adam Heydon*, a freeholder and inhabitant of *Hudson*, must be deemed to have belonged to *Hudson*. The domicile of the wife is that of her husband. The Court below were the best judges as to the color of the children, whether it was of that degree of blackness as to render it certain, or probable, that *Adam Heydon* was not the father of *William Heydon*. This Court cannot have the same evidence before them.

Then, was there a valid indenture of *William Heydon* to service? The binding must be by writing, and by the father of the child, or by the overseers of the poor. The mother, being a married woman, had no power to sign the indenture. True, she is the natural parent and guardian; but the law has declared, in the case of bastardy, that the overseers of the poor, for the purpose of binding to serve, shall be the parents of the child. The indenture, to be legal and valid, must be such a one as, if necessary, could be enforced.

[ \* 247 ]

*YATES, J.*, delivered the opinion of the Court. If the return had stated that *Catreen Race*, a white woman, had been delivered of a mulatto child, instead of a black child, there could be no question on the subject of illegitimacy, because it would have appeared impossible for *Adam Heydon*, a white man, to have been the father; and the law, in such case, would pronounce the child a bastard; the presumption in favor of its legitimacy being destroyed by satisfactory proof rendering it impossible to be the husband's child. (1 *Roll. Abr.* 358.) Though the description of the child is not as definite as it might have been, yet I am inclined to think, that enough appears, according to the common acceptation of the language made use of in the return, to show the real situation of it; for, it must be admitted, that, in common parlance, a black child means a negro, or mulatto child, and giving either of those significations to the terms used in the return, would produce the same result as to its illegitimacy; but, whether *Catreen Race* was delivered of a legitimate or a bastard child, is rendered immaterial, as respects the liability of the overseers of *Hudson*, because the return states, that the child was bound out in the present town of *Livingston*, to one *Phillips*, with whom he remained, in that place, six years, and then went with his master to that part of *Livingston* called *Taghkanac*, and continued there twenty months, or until he went with him to *New-Jersey*. His last place of residence, therefore, in this state, was *Taghkanac*; but the binding, and first habitation, under the indenture, were in the town of *Livingston*. By the colonial law, (*Van Schaick's* ed. 752.) if any person was bound an apprentice by indenture

or by deed, writing, or contract, not indented and inhabited in any city, town, parish, precinct, or district, such binding and inhabitation was adjudged a good settlement. The child, in this case, was bound in the present town of *Livingston*, and the binding and inhabitation together had taken place in the same town, and not in *Taghkanac*; so that, according to the principles contained \*in the decision of this Court, (3 *Johns. Rep.* 193.) with regard to the effect of the division of towns as to subsequent paupers, the town of *Livingston* would be chargeable with the maintenance of the paupers in question; and if *William Heydon* could even be deemed legitimate, yet the apprenticeship stated was sufficient, under the above colonial law, to exonerate the overseers of *Hudson*; for it cannot be doubted, but that the binding of the child, by the mother, under the circumstances of this case, must be deemed competent to create a settlement under the above act; because the indentures of apprenticeship, although not signed by *Adam Heydon*, continued operative during the whole term of service, from the time the child was two years old, until he arrived at the age of twenty-one years; so that *Heydon's* assent, in fact, proved unnecessary, and his subsequent acquiescence (if it had been necessary) is conclusive evidence of such assent.

If *Adam Heydon* had objected to the binding, and rendered the contract, or indenture, inoperative, for any period of time during the apprenticeship, the overseers of the town of *Taghkanac* might have been justified in the attempt to make the overseers of the poor of *Hudson* chargeable; but the full and entire service having been rendered, according to the indenture, the objection taken by them ought not to prevail: it is sufficient that there has been a substantial compliance with the intent and meaning of the act of the colony. According to the principles laid down by Lord *Hardwicke*, in *Rex v. The Inhabitants of St. Nicholas, in Ipswich*, (*Burr. Sett. Cas.* 91. No. 28.) the town cannot be allowed to take advantage of the alleged defect in the indentures. It is enough that no interruption, for so long a term of service as this case presents, has taken place; and the binding and inhabitation of the apprentice, under the contract and indentures, according to the colonial law, created a settlement which the return states to have been in the town of *Livingston*. The overseers of *Hudson* are, therefore, exonerated from the maintenance of his widow and children, the paupers in question. The judgment of the Court below must, consequently, be reversed, and the order of the justices quashed.

NEW-YORK,  
May, 1816.

OVERSEERS OF  
HUDSON

V.  
OVERSEERS OF  
TAGHKANAC.

[ \* 248 ]

Order of the sessions quashed.

NEW YORK,  
May, 1816.

WYLIE  
v.  
HYDE.

\*WYLIE *against* HYDE and HYDE.

IN ERROR, on *certiorari* to a justice's Court.

The jury, in a justice's Court, cannot find a special verdict; nor can the justice render any judgment on such verdict.

The priority of executions in a justice's Court, depends not on the time of delivering the execution to the constable, but on the time of actual levy.

It is sufficient, if a constable levy on an execution, and advertise for sale, within 20 days after he has received the execution, but sells after the expiration of the 20 days, provided the sale were made before the return day of the writ; and such sale will be valid against an intermediate levy and sale on another execution. (a)

And the advertisement may be made on a day subsequent to the levy, provided both were within the 20 days.

This was an action of trover for a sleigh, brought by the defendant in error against the plaintiffs in error. The jury in the Court below found a special verdict, which stated, that, on the 6th of *August*, 1813, the plaintiffs below recovered judgment before a justice of the peace, against *Samuel Burnam*, for 23 dollars and 60 cents; that, on the 6th of *September*, 1813, execution was issued thereon, and delivered to a constable, who, on the 23d of *September*, levied on a sleigh, the property of *Burnam*, and the same day advertised it to be sold on the 29th of *September* then instant, at which day it was sold at public vendue to the plaintiffs below, but no endorsement was made on the execution of the time of such levy; that, on the 13th of *September*, 1813, one *Lynch* recovered a judgment before the same justice, against *Burnam*, for 16 dollars and 31 cents; and that an execution was issued thereon, and delivered to another constable, by consent of *Burnam*, who made a levy on the same day on the before-mentioned sleigh, and endorsed the levy on his execution on that day, and on the 2d of *October* gave notice that the sleigh would be sold on the 9th of that month, when it was, accordingly, sold, at public vendue, to *Wylie*, the defendant below; that notice of the prior levy was given by the second constable to the constable who had the first execution before his levy was made, and he gave such notice to the plaintiffs below, before the sale, who directed him to sell; and at, and before, the second sale, notice was given by the plaintiffs to the defendant of the prior purchase; that the sleigh was never removed from *Burnam's* barn until after the sale to the defendant below, who then converted it to his own use; and that the judgments and executions, and the proceeding thereon, were *bona fide*, and without fraud; and that the value of the sleigh was 25 dollars. On the verdict being presented to the Court, the defendant below objected to a special verdict being received; but the justice overruled the objection, and received the verdict, on which he gave judgment for the plaintiffs below for the value of the sleigh, and costs.

[ \* 250 ]

\*YATES, J., delivered the opinion of the Court. I am inclined to think that no judgment can be rendered on a special verdict in a justice's Court. The act constituting those Courts is silent on the subject. The 29th section (b) of the act for regulating trials by issues, and for returning able and sufficient jurors, does not apply to justice's Courts. It ordains that no jury, upon any trial thereafter to be had, shall, in any case, be compelled to give a general verdict, so that they find a special ver-

(a) Vide *Connell v. Cook*, 7 Cow. Rep. 312. *Pixley v. Butts*, 2 Cow. Rep. 421.

(b) 2 R. S. 421.

dict, and show the truth of the fact, and require the aid of the Court or justices.

By this, as well as the preceding sections of the act, it would appear that the rendering of special verdicts is not extended to inferior tribunals; and, according to the principles laid down in *Day v. Wilburn*, (2 *Caines's Rep.* 135.) the privilege not having been specially given by statute to jurors in justices' Courts, it cannot be exercised in those Courts. That case states, that proceedings under the 10 pound act are to be regulated entirely by that act, and that the act relative to common informers does not apply to such proceedings.

This Court have decided that a demurrer to evidence is a proceeding inapplicable to a justice's Court, because justices are not, generally, acquainted with the science of law; (3 *Caines's Rep.* 140.) yet, should special verdicts be allowed in such a Court, the same legal knowledge would be requisite to enable a justice to render judgment on such verdict, because, in one instance, the facts are admitted by the party, and, in the other, they are found by the jury; and the only question in either case is a question of law, to be determined by the justice. Besides, it might be attended with unavoidable injustice to a party; for a special verdict might be so defective that no judgment could be rendered thereon. In such case the practice of other Courts† (having the power) is to award a *venire facias de novo*. This a justice cannot do. The party, consequently, would be without a remedy in that cause, and would be obliged to commence a new action: it, therefore, appears to be manifestly unfit and improper that special verdicts should be allowed in justices' Courts. But admitting that the special verdict, in this instance, could be received, the judgment rendered on it would be erroneous.

It appears that the constable, under whom the plaintiffs in error claimed, levied on the sleigh the 13th of *September*, and the constable, under whom the defendant in error claimed, \*levied on the 23d of *September*. This was sufficient to entitle the plaintiffs in error to recover in the Court below, if the subsequent proceedings of the constable were correct. The prior delivery of the execution in favor of the defendant in error could not alter the effect, because the date or time of issuing, or delivery to a constable, of executions, issuing from a justice's Court, cannot be material, in determining what property is held by it. Each town and city has a number of constables in it, and if such a rule prevailed, it would create the greatest confusion. The time of making the levy only can control the right to the property, and that alone can create the lien; it then, and not before, is properly in custody of the law.

The thirteenth section of the twenty-five dollar act declares, that in case any constable to whom any execution shall be delivered shall not, within twenty days after receiving such execution, levy the same on the goods and chattels of the person

NEW-YORK,  
May, 1816.

WYLLIE  
v.  
HYDE

† *Sellon*, 495

[ \* 251 ]

NEW-YORK,  
May, 1816.

TIFFANY  
v.  
DRIGGS.

against whom such execution shall be granted, and in ten days thereafter pay the debt, he shall be holden to pay the amount of the execution. According to this section, if the constable make the levy, and advertise within 20 days, and sell within the life of the execution, it is sufficient. The execution in favor of the plaintiffs in error was delivered, and the levy made, on the 13th of *September*; the constable advertised on the 2d of *October*, within the 20 days, and sold on the 9th, clearly before the return of the execution; the proceedings were, therefore, perfectly regular; and the constable who made the second levy had no right (especially after notice given) to sell the property; and the above, in part, recited section of the act is explanatory of, and must control, the preceding section of the act, which ordains that the constable, after taking the goods and chattels in his custody by virtue of such execution, shall *immediately* give public notice by advertisement, signed by himself, &c.: it is evident that the term *immediately*, thus used, cannot be so construed as to intend that, because the property first levied had not been immediately advertised, the lien thereby created should be destroyed, and that the second levy should prevail. It is enough if the advertisement is within 20 days, so that the sale may be made at any time before the return of the execution. The judgment must be reversed.

Judgment of reversal.

[ \* 252 ]

\*TIFFANY against DRIGGS and LYNCH.

Where an attorney is sued in a justice's Court, jointly with another defendant, he cannot plead in abatement, that the Court, of which he is an attorney, is then sitting. (a)

IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error brought an action of *assumpsit* against the defendants, in the Court below, for work and labor; the defendants pleaded, that *Lynch*, one of the defendants, was an attorney of the Supreme Court, which was then sitting. The plaintiff objected that the Supreme Court was not sitting when the summons was issued, but the justice decided that this was immaterial, and the plaintiff having no further answer, the justice gave judgment for the defendants.

*Per Curiam.* The first section of the act for the recovery of debts to the value of 25 dollars, (1 *N. R. L.* 387.) (b) gives cognizance to a justice of the peace of all actions not exceeding 25 dollars, as well against attorneys and other officers of any Court of justice in this state, (except during the sitting of such Court,) as others.

Before the passing of this statute, it must be conceded that an attorney in no Court of justice could be allowed to plead

(a) An attorney, or other officer of the Court, is never privileged from arrest when sued with another, though during the actual sitting of the Court, and during his attendance at Court. 3 *Cow. Rep.* 368. Vide *Gilbert v. Vanderpool*, 15 *Johns. Rep.* 242. *Secor v. Bell*, 18 *Id.* 52. 2 *R. S.* 290.

(b) 2 *R. S.* 225.



his privilege, when prosecuted, jointly with others; and the above section does not enlarge this privilege so as to extend it to such a case. It evidently intends no more than that an attorney shall not avail himself of the privilege he was entitled to before the passing of the act, except during the sitting of the Court; and the law remains unaltered when he is sued jointly with another.

*Lynch* having been prosecuted jointly with *Driggs*, his plea of privilege ought not to have been allowed by the justice. It was, therefore, unimportant whether the Court, of which he was an attorney, was in session at the time the summons issued, or when the trial took place: it is manifest, that the proceedings of the justice were erroneous in extending to him a privilege to which he was not entitled. The judgment must, therefore, be reversed.

Judgment reversed.

*\*TIFFANY, qui tam, &c. against DRIGGS.*

[ \* 253 ]

IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error, who was, also, plaintiff in the Court below, declared, in debt, as well for himself as for the overseers of the poor of the town of *Rome*, against the defendant, for selling, on the 1st of *January*, 1814, one gill of gin, to be drank in the store of the defendant, without having entered into such recognizance as is required by the act to lay a duty on strong liquors, and for regulating inns and taverns; and for selling like small quantities of liquors to the plaintiff and others, on each day in that month; and for selling to the plaintiff, on the 1st of *January*, 1814, one quart of gin, without having the license required by the said act; and for the like offences on every other day in the same month; and concluded with demanding twenty-five dollars of debt, for the penalty of one of the said offences.

At the trial, the plaintiff offered to prove, that, some time in the month of *January*, 1814, the defendant sold, at his store-house, half a pint of gin to *Job Sherman*, (one of the persons to whom the defendant was charged in the declaration to have sold liquor,) to be drank in his store-house, without having entered into the recognizance required by the statute. This testimony was objected to, unless the witness would specify the particular day of selling. The justice decided, that the objection was well taken, and nonsuited the plaintiff.

*YATES, J.*, delivered the opinion of the Court. This Court have decided that the act to lay a duty on strong liquors, and for regulating inns and taverns, inflicts but one penalty for the offence of selling liquors without a license, and that the amount of such penalty only can be recovered in one action. *Wash-*

NEW-YORK,  
May, 1816.

TIFFANY  
DRIGGS.

In an action to recover the penalty given by the 7th section of the act to lay a duty on strong liquors, &c. sess. 24. c. 164., the plaintiff may unite, in his declaration, any number of offences, but he can only recover the penalty for a single offence; and a conviction in such action is a bar to all prosecutions for offences of the like nature committed before such recovery.

It is unnecessary for the plaintiff to prove the precise day of committing the offence; and it will be sufficient for the justice, in making up the record of conviction, to insert the day laid in the declaration, although no particular day was proved.

NEW-YORK,  
May, 1816.

TIFFANY  
v.  
DRIGGS.

[ \* 254 ]

*burn v. M'Inroy.* (7 *Johns. Rep.* 134.) The eighteenth section of the same act (1 *R. L.* 181.) (a) ordains, that, whenever any suit shall be commenced, and a recovery had, for a penalty incurred by selling strong or spirituous liquors, without license, such recovery shall be a bar to all prosecutions for offences of the like nature, committed before such recovery.

\*It appears, by the return of the justice, that the evidence offered on the part of the plaintiff, went to show that the liquor, as stated in the declaration, had been sold by the defendant some day in *January*, 1814. This ought to have been deemed sufficient, because, by the above section of the act, the recovery would have been a bar to all previous offences; and the particular day of the month was not material or necessary to support the declaration. It was enough that the evidence went to prove one offence in the month of *January*, as no more than one penalty could have been recovered for any number of the like nature previously incurred.

I am aware that, by the 8th section of the twenty-five dollar act, the form of the record of conviction is given, and that the justice is thereby required to insert the day when the offence was committed; but this does not render it necessary that the evidence should state the day with greater certainty than was done in the present case, because proof of any day before the commencement of the action was sufficient; and the trial, in this instance, was in *January*, 1815; and the witness stated the offence to have been committed in the preceding *January*, so that I can see no reason, according to the most rigid construction of the act, (being a penal statute,) why the justice, in making up the record of conviction, would not have been authorized to insert any day in the month of *January*, 1814, according to the declaration and the evidence before him in support of it; and being thus enabled to comply with the form prescribed by the act, it is evident that the plaintiff ought not to have been nonsuited on the ground that no particular day was proved. The judgment must, therefore, be reversed.

Judgment reversed.

(a) 1 *R. S.* 680.

\*SLINGERLAND against SWART, former sheriff of the County of Schoharie.

NEW-YORK,  
May, 1816.

SLINGERLAND

SWART.

THIS was an action of *assumpsit*, and was tried at the Schoharie circuit in November, 1815.

The plaintiff gave in evidence exemplifications of two executions in the Supreme Court, and the return thereto. 1. A *fi. fa.*, tested the 13th of October, 1813, and directed to the sheriff of Schoharie, against Joseph Becker and Philip Serviss, for four thousand dollars of debt, recovered by Slingerland, the plaintiff in this cause, and 14 dollars and 43 cents damages and costs; the judgment was docketed on the 12th of October, 1813, and the execution was returnable on the 15th of January, 1814. By an endorsement on the execution, it appeared that it was received in the sheriff's office on the 4th of January, 1814, who was directed to levy, debt to 1,948 dollars and 90 cents; plaintiff's costs, 14 dollars and 43 cents; and defendant's costs, 3 dollars and 31 cents, with interest and fees. 2. A *fi. fa.*, tested the 13th of October, in the twenty-eighth year of our independence, directed to the sheriff of Schoharie, for 6,000 dollars debt, recovered by Samuel Lawyer, and 14 dollars and 62 cents damages and costs; the judgment was docketed on the 22d of October, 1813; the execution was returnable on the first Monday of January, 1814. This execution was received in the office of the sheriff on the 19th of November, 1813, and was endorsed to levy 3,000 dollars debt, 14 dollars and 62 cents plaintiff's costs, and 3 dollars and 31 cents defendant's costs, with interest and fees. On this execution was endorsed a receipt, dated the 9th of December, 1813, for 902 dollars and 46 cents; and, also, another receipt, dated January 22d, 1814, for 446 dollars and 87 cents. 3. The return of the defendant to these two executions, which was as follows: "I do humbly certify and return, that the execution hereto annexed, in favor of Samuel Lawyer, was received by me, on the 19th of November, 1813: I received direction from the plaintiff, at the same time, not to proceed until further orders from him. On the 3d day of January, 1814, (the return day thereof,) I was directed by the plaintiff, and, likewise, did levy on certain goods belonging to the defendant, in the defendant's store, which were, afterwards, sold by me, for 446 dollars and 87 cents, which sum is endorsed by the plaintiff on said execution. That I went on that day to another store of the defendant's, about four miles from the first store, with intent to make a further levy on said execution, but did not arrive there until after midnight; and, the door being locked, I returned to my lodgings, with intent, next morning, to

Where a sheriff has two executions against the same defendant, and having levied part of the amount of the prior execution; proceeds, after the return day of that execution, to make another levy, he must apply the sum thus made in satisfaction of the junior execution; the latest period which the law allows for the service of a writ, being the day on which it is returnable. (a)

If the plaintiff, in the junior execution, obtain a rule, directing the sheriff to pay over the money to him, he is not bound to proceed by attachment, but may maintain an action of *assumpsit* against the sheriff. (b)

And, after such rule of the Court, and demand made by the plaintiff to pay him the money the sheriff, being clearly in default, is chargeable with

[ \* 256 ]  
interest from the time of demand. (c)

(a) But a delay in selling property levied upon in time, does not render the sale void as against a subsequent execution issued subsequent to the sale. *Linnendale v. Doe*, 14 Johns. Rep. 222.

(b) Vide *Russel v. Gibbs*, 5 Cow. Rep. 390.

(c) Vide *Rensselaer Glass Factory v. Reid*, 5 Cow. Rep. 587.

NEW-YORK,  
May, 1816.

SLINGERLAND  
v.  
SWART.

go there again to make seizure. Next morning, before I started to go to said store, I received the other execution in favor of *Douw B. Slingerland*, (the plaintiff in this cause,) hereto annexed. I then made the seizure of the goods in said store, and the sales thereof produced 508 dollars, which I have on hand ready to bring into Court, or to pay over, as I shall be directed; not being advised how to pay over the same, and humbly ask the aid and direction of the Court in the premises." Signed by *Daniel Douw*, under sheriff, for the defendant.

The defendant then gave in evidence a certified copy of a rule granted by this Court, on the 15th of *January*, 1814, in the cause of *Becker and Serviss*, at the suit of *Slingerland*, by which proceedings on the execution in that cause, against *Serviss*, were stayed until the further order of the Court. Proof of the service of this notice on *Douw*, the under sheriff, was given. The plaintiff then gave in evidence an order of this Court of the 13th of *January*, 1815, by which the former order was vacated, and the sheriff directed to pay over to the plaintiff, in that suit, the moneys collected by him. Service of a copy of the order on *Douw*, the defendant's deputy, was proved, and a demand of the sum of 508 dollars, mentioned in the return to the executions, before suit brought. A verdict was found, by the jury, for the plaintiff, for that sum, with interest from the time the demand was made.

The cause was submitted to the Court without argument.

*Per Curiam.* It is not necessary, in this case, to decide whether *Lawyer's* execution was fraudulent and void, so as to give priority to the plaintiff's, because no more is claimed of the sheriff than the avails of the property levied on after the return day of *Lawyer's* execution; and there can be no possible ground upon which the recovery, to this extent, can be resisted. It is, certainly, a principle not to be questioned, that a sheriff cannot levy an execution upon goods and chattels after the return day \*is passed. The latest period which the law allows for the service of process, is the day on which it is returnable. (2 *Caines's Rep.* 244. 4 *Johns. Rep.* 456.) It is not pretended by the defendant, that he has paid over the money to *Lawyer*; and, indeed, the return made by him, upon that execution, shows he has not paid it over. He, therefore, has not been misled, or in any way prejudiced, by the rule of *January* term, 1814. And, although the plaintiff might, under the rule of *January* term, 1815, have compelled the sheriff, by attachment, to pay over the money to him, this does not take away his remedy by action. Nor can there be any objection to the recovery of the interest, as found by the verdict, after the order of the Court directing the sheriff to pay over the money to the plaintiff, and a demand made upon him for the same. He was clearly in default, and ought to be charged with interest on the money thus wrong

[ \* 257 ]

fully withheld. The plaintiff is, accordingly, entitled to judgment for 534 dollars and 60 cents, as found by the jury.

Judgment for the plaintiff.

NEW-YORK,  
May, 1816.

SMITH  
v.  
WARE.

### SMITH *against* WARE.

IN ERROR, to the Court of Common Pleas of the county of *Washington*.

This was an action of *assumpsit*, brought, in the Court below, by *Smith*, the plaintiff in error, against *Ware*, the defendant in error. The declaration consisted merely of the money counts, to which the defendant pleaded *non assumpsit*.

The plaintiff claimed compensation for a deficiency in the quantity of land of a certain farm sold by the defendant to the plaintiff. At the trial, the plaintiff read in evidence a deed from the defendant to the plaintiff, dated the 29th of *April*, 1807, by which the defendant, for the consideration of 419 dollars and 50 cents, granted to the plaintiff a certain lot of land, described as follows: "All that certain piece or parcel of land, situate, lying, and being in the county of *Washington*, and town of *Bolton*, \*being the west part of lot No. 9, in a tract of land granted to *Wheeler Douglass*, by letters patent, the 18th of *April*, 1794, bounded, &c., supposed to contain ninety-three acres." The plaintiff then proved that a surveyor had been employed, and paid by the defendant, to survey the land which had been taken off from the west end of the lot sold by the defendant to the plaintiff, by the survey made of the state lands, by the direction of the surveyor-general, for the purpose of ascertaining the quantity so taken off: both parties attended the survey, and, also, two chain-bearers chosen by them: the parties pointed out the lines which were run by the surveyor, and it was ascertained that the quantity taken off amounted to 22 acres, 2 rods and 4 perches; and it was ascertained, at the same time, that the original boundaries would not include the quantity of 93 acres, but fell short 5 or 6 acres. The plaintiff offered to prove a recognition, by the defendant, of his liability, and a promise to pay for the deficiency; but the evidence was objected to, and a nonsuit applied for; and the Court decided that the evidence was inadmissible, and that the plaintiff should be nonsuited, on the ground that there was no consideration for the promise of the defendant. The plaintiff refused to be nonsuited, and excepted to the opinion of the Court; and the cause being left to the jury, a verdict was found for the defendant.

A bill of exceptions was received, and the cause brought before this Court by writ of error.

*Wendell*, for the plaintiff, contended that the moral obligation to return the money was a sufficient consideration to support

Where land is sold, and described in the deed as supposed to contain a certain quantity, and a deficiency is, afterwards, discovered, there is no obligation on the grantor to compensate the grantee for such deficiency; and a promise to pay for the same is without consideration, and will not support an action of *assumpsit*.

[ \* 258 ]

NEW-YORK, the promise; and he relied on the cases of *Howe v. Barker*,†  
 May, 1816. and *Houghtaling v. Lewis*,‡ as in point.

SMITH  
 V.  
 WARE.  
 † 3 *Johns. Rep.*  
 506.  
 ‡ 10 *Johns.*  
*Rep.* 297.

§ 3 *Johns.*  
*Rep.* 508, 503.  
 10 *Johns. Rep.*  
 297. 2 *Caines's*  
*Rep.* 417. 1  
*Johns. Rep.* 414.  
 440.

[ \* 259 ]

*Z. R. Shepherd*, contra, contended, that if the defendant promised under an ignorance of the law and the fact, he ought not to be bound. If the Court below have decided correctly, it is sufficient, whether the reasons assigned by them for their decision be sound or not. The covenant can raise no implied *assumpsit*, and where there is a covenant, *assumpsit* will not lie. § If the plaintiff can recover at all, it must be on the new promise; and on that the plaintiff should have declared specially. There is no consideration for that promise.

\**Wendell*, in reply, said, that the case of *Howe v. Barker* showed that the form of declaration, in this case, was sufficient for the plaintiff.

SPENCER, J., delivered the opinion of the Court. It cannot be pretended that the defendant was under any moral obligation to pay for the deficiency in the quantity of land sold and conveyed to the plaintiff. There is no pretence of any fraud in relation to the sale, and the deed is very explicit in its terms. The land granted was truly described, and it is evident, from the deed, that the parties do not contract, in reference to any specific quantity of land; for the deed states, that the tract is supposed to contain 93 acres. There would be no mutuality between the parties, if we were to say, that the defendant was *morally* bound to make up any deficient quantity, because it is very certain that, had there been an overplus, the plaintiff could not have been compelled to pay for the excess. (a) We have a right to infer that the deed contains no covenant of warranty; the defendant, therefore, sold, and the plaintiff agreed to take, the land, under a conveyance containing no stipulations, either as to quantity or title. Under these circumstances, a promise to pay for any of the land included in the surveyor-general's survey was without a consideration.

There is much nice learning in the books, upon the point of moral obligation, and as to what is, or is not, a sufficient consideration to uphold a promise. The result of all the cases on this head is, I think, admirably summed up in a note to 3 *Bos. & Pull.* 249. "An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded never could have been enforced, at law, though not barred by any legal maxim or statute provision."

The judgment, in this case, must be affirmed.

Judgment affirmed.

(a) Vide *Jackson v. Barringer*, 15 *Johns. Rep.* 471.

## \*BATES against SHRAEDER.

NEW-YORK,  
May, 1816.BATES  
v.  
SHRAEDER.

IN ERROR, on *certiorari* to the Court of Common Pleas of the county of *Dutchess*.

This was an action of waste. The declaration stated, that *Elizabeth Graham* was seised in her *demesne*, as of fee, in certain premises, in the town of *Fishkill*, which are described by metes and bounds, and contained twenty-five acres; and being so seised, she married *Duncan Graham*, and, during the coverture, they had a son born, *John Graham*, by which marriage, and birth of a son, *Duncan Graham* became entitled to the premises as tenant by the curtesy, the reversion being in the said *Elizabeth* and her heirs; that *Elizabeth Graham* died, whereby her son, *John Graham*, became entitled to the reversion of the premises, as heir to his mother; that *John Graham* died without issue, and without leaving any brother or sister, or any legal representative of such brother or sister, and that the plaintiff became entitled to the reversion as heir at law of *John Graham*, he, the plaintiff, being the oldest son of *John Bates*, deceased, who was the oldest brother of *Elizabeth Graham*, and the oldest uncle of *John Graham*; that *Duncan Graham*, during the continuance of his estate as tenant by the curtesy, in the year 1809, assigned his estate in the premises to the defendant, who, being in the possession thereof, did wrongfully and unjustly make waste, sale, and destruction, in the whole of the said premises, by destroying and changing the nature of the land, &c.; by felling timber, &c., and felling divers trees, &c., to the disinherison of the plaintiff, and against the form of the statute in such case provided.

To this declaration there was a general demurrer, and joinder in demurrer.

*J. Tallmadge*, in support of the demurrer, contended, that *John Graham* did not constitute a stock of descent; for, as the tenant by the curtesy was still living, the descent was suspended; and for this, the case of *Jackson v. Hendricks*† was an \*authority in point. In the action of waste, the plaintiff must set forth his title specifically and definitely.‡

Again; the heir at law cannot bring this action against the assignee of the tenant by the curtesy, for the privity remains between the tenant by the curtesy and the heir.§ Our statute,|| for preventing waste, is a transcript from the statute of *Gloucester*, 6 *Edw. I. c. 5.*; and, though the statute gives a remedy for the grantee of the reversion, against the tenant or his assignee,

Where *A.* is seised of a reversion expectant on the determination of the life estate of a tenant by the curtesy, as son and heir of *B.*, the wife of the tenant by the curtesy, and in whom was the fee of the land, *A.* does not become a new stirpes, or stock of descent; but a person claiming the reversion must deduce his title immediately from *B.*, the person who was last actually seised in fee of the land.

Therefore, the eldest son of the eldest uncle of *A.* will not inherit, but the brothers and sisters of *B.*, and their representatives, are the next heirs, according to the provisions of the statute of descents.

An action of waste does not lie by the heir against the assignee of the

[ \* 261 ]  
tenant by the curtesy, but only against the tenant himself.

† 3 *Johns. Cas.* 214. 2 *Bl. Com.* 209. 227. n. 13. 312. 2 *Woodes*, 252, 253, 254. 2 *Wils. Rep.* 47. 2 *Co. Litt.* 241. b.

‡ 2 *Sessul. 234.* 6 *Com. Dig. Waste*, (C. 4.) 518.

§ 7 *Bac. Ab.* 267, 268. *Waste*, (H.) 2 *Inst.* 300, 301, 302. *Fisher's* 129. (F.) 123. (A.) *Co. Litt.* 54. a. 316. a.

|| 1 *N. R. L.* 62. sess. 10. c. 6. a. 3. (a)

NEW-YORK,  
May, 1816.

BATES

v.

SHRAEDER.

† 1 *Cruise's*  
*Dig.* 124. *Cur-*  
*tesy*, c. 2. s. 32.  
2 *Bac. Ab. Cur-*  
*tesy*, (E.)

† 1 *N. R. L.*  
527. sess. 36. c.  
56. s. 33. (a)

§ 11 *Johns.*  
*Rep.* 429.

yet no remedy is provided where the heir keeps the reversion against the assignee of the tenant.†

Should it be said, that the 33d section of the act for the amendment of the law, which gives an action of waste, or trespass, to the remainder-man, or reversioner, for any injury done to the inheritance, notwithstanding any intervening estate for life, or for years,‡ supplies a remedy for this case, it may be answered, that, by the construction given to that section of the act, by the Court, in the case of *Livingston v. Haywood*,§ the difficulty of the intervening estate only is removed, as between the remainder-man or reversioner and the tenant; and the action of waste lies only against the tenant, though trespass may be brought against a stranger.

*P. Ruggles*, contra, contended, that the title was sufficiently set forth. The declaration avers, that the plaintiff was the eldest son of *John Bates*, who was the eldest brother of *E. Graham*, and the oldest uncle of *John Graham*, though it is silent as to there being other brothers or heirs. If the defendant meant to avail himself of the existence of such a fact, he should have traversed the facts in the declaration. It was not a matter to be pleaded in abatement.||

|| *Com. Dig.*  
*Abatement* (E.  
8.) (E. 10.)

¶ *Sess.* 9. c.  
12. s. 4. 1 *N.*  
*R. L.* 52. (b)

The statute of descents¶ provides, that nothing therein contained shall be construed to bar or injure the right or estate of a husband or tenant by the curtesy, or a widow's right of dower. Admitting the doctrine as to descents, still there is that reversionary interest in the plaintiff which entitles him to this action.

†† *Co. Litt.* 54.  
a. 6. *Com. Dig.*  
*Waste*, (C. 4.)

[ \* 262 ]

It is true that the action may be maintained by the heir against the tenant by the curtesy, notwithstanding he has assigned his interest; but the heir has his election to bring his action against the assignee. *Coke*†† says, "If the heir either before the assignment had granted, or after the assignment doth grant, the reversion, &c., the stranger shall have an action of waste against the assignee, because, in both cases, the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste, (for it is in the nature of a trespass,) unless it be in the case of a ward." The lord may elect the assignee of the tenant to be his tenant.

This case comes within the act which gives the remainder-man or reversioner an action of waste and trespass for any injury done to the inheritance, notwithstanding an intervening estate for life or for years.

Suppose a recovery in an action against *Duncan Graham*, for the place wasted, and treble damages, what remedy would he have? The plaintiff elects to bring his action directly against the person who has done the injury, and who ought to pay the penalty.

(a) 1 *R. S.* 750.

(b) 1 *R. S.* 754.



YATES, J., delivered the opinion of the Court. This is an action of waste, brought by the plaintiff against the assignee of the tenant by the curtesy. The declaration states, that the plaintiff's right of inheritance to the *locus in quo* is derived from *John Graham*, as the person last seised. It also states the previous seisin of *Elizabeth Graham*, his mother, who died, leaving her husband tenant by the curtesy, from whom the defendant holds the premises by assignment; that *John Graham* derived his inheritance from the mother; and that both died without lawful issue. The waste is specially stated, and it then concludes that the plaintiff is injured, and has sustained damages to the value of two thousand dollars, and, therefore, he brings suit, &c.

NEW-YORK,  
May, 1816.

BATES  
v.  
SHRAEDER.

To this declaration there is a general demurrer and joinder; and in support of the demurrer it is insisted, that *John Graham* was not so seised as to form a new stock of descent, and that the plaintiff is not heir at law; and if he be such heir, that waste does not lie by him against the assignee of the tenant by the curtesy.

From the facts set forth in the declaration, it does not appear that this is a case not provided for in our statute to regulate descents; and the common law governs only in cases not provided for by that act. It is stated that the inheritance is claimed through *John Graham*, the son, who died in the lifetime of his father, the tenant by the curtesy. There can be no doubt that this tenancy suspended the descent, so that the inheritance could \*not be transmitted during the continuance of that estate, as no stock of descent, during its existence, could be formed by *John Graham*. And as it does not appear, by the declaration, when the mother died, or whether she left any other brother or sister besides the plaintiff in this cause, a sufficient title to the inheritance is not shown to sustain the action.

[ \* 263 ]

But admitting that the plaintiff is entitled to the inheritance, it is clear he cannot seek redress from the present defendant. (1 *Inst.* 54. 2 *Inst.* 301. a.) At common law, the assignee of the tenant by the curtesy cannot be sued in waste. The action ought to have been brought against the tenant himself by the heir; and the books state that thereby he shall recover the lands against the assignee, for the privity which is between the heir and tenant by the curtesy. (*Walker's Case*, 3 Co. 23.) So, if tenant in dower, or tenant by the curtesy, grant over their estate, yet the privity of action remains between the heir and them, and he shall have an action of waste against them for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed, and the grantee cannot have any action of waste but only against the assignee; for between them is privity in estate; and between them and the tenant in dower, or the tenant by the curtesy, is no privity at all; so that, at law, if the assignee is suable in waste, there must be a privity of estate; unless, then, the ac-

NEW-YORK,  
May, 1816.

BATES  
v.  
SHRAEDER.

tion against the assignee is warranted by the statute, it is im-  
properly brought in this instance.

The section in the act (sess. 36. ch. 56.) (a) does not author-  
ize this action, for, according to the decision in *Livingston v.*  
*Haywood*, it gives the reversioner or remainder-man an action  
of waste or trespass for any injury done to the inheritance, not-  
withstanding an intervening estate for life or for years; it gives  
the action of waste where waste is the appropriate remedy, and  
trespass where trespass is the appropriate remedy, but does not  
alter the law as to the requisite privity of estate between the  
heir and the tenant by the curtesy, so that the principle contin-  
ues the same as to his assignee, who, without such privity, is  
not liable in waste.

The 6th and 7th sections of the act for preventing waste,  
contain no authority for this action; the 6th gives the right of  
action to the heir at any time during or after his minority, and  
the 7th section declares tenants for life, or for another's life, or  
\*for term of years, or any other term, liable to waste after grant-  
ing their estates, if they take the profits. Neither of those sec-  
tions can be so construed as to alter the law on the subject, so  
as to give the heir an action of waste against the assignee of the  
tenant by the curtesy. It would seem that such an action can  
be brought in no case, except where the heir has granted over  
the reversion, because, as before stated, by the grant the privity  
of the action is destroyed, and the grantee cannot have any ac-  
tion of waste but only against the assignee, for as between them  
there is privity in estate, but no such privity; after the grant, ex-  
ists between the assignee and the tenant by the curtesy. It is,  
therefore, evident, that the action of waste, in this instance  
cannot be maintained by the heir against the assignee. The law  
is decidedly against it; and the principles in relation to tenants  
by the curtesy ought to be strictly applied, in an action like the  
present, because the judgment operates as a penalty, the recov-  
ery being not only for the place wasted, but treble damages.  
The defendant is, consequently, entitled to judgment.

Judgment for the defendant.

(a) 1 R. S. 750.

## MARTIN and others against WILLIAMS.

NEW-YORK,  
May, 1816.

MARTIN

v.

WILLIAMS.

THIS was an action of debt. The plaintiffs declared on a bond, dated the 2d of *August*, 1814, in the penalty of 10,000 dollars. The defendant craved oyer of the bond, the condition of which recited, that a contention subsisted between the parties respecting the title to 200 acres of land, being part of lot No. 34, in the town of *Whitehall*, in the county of *Washington*; and that two actions of ejectment were proceeding in this Court, on the demise of the plaintiffs; the one against *Stephen Wood*, as tenant in possession of some part of the said 200 acres, and \*against *Wait Webster*, as tenant in possession of some other part thereof; and an action of trespass for the mesne profits against *Reuben Pratt*, against whom a recovery had been had in an action of ejectment, on the demise of the plaintiffs, for part of the said two hundred acres; and an action of ejectment on the demise of the defendant, against the said *Reuben Pratt*, as tenant in possession of some part of the said two hundred acres; which said title and actions, and the subject matters thereof, and all difference, contention, and demands, concerning the same, and the profits of the said land, the parties have agreed to refer to the award of three persons named therein; and that it was agreed, that the arbitrators, in hearing the proofs and allegations, and in making their award, should proceed and govern themselves according to the rules of law and equity as far forth as the same might be applicable to the subject matter of the submission, and that the arbitrators should award costs to be paid by the parties respectively, against whom they should determine, having respect to the several actions above named; and that the arbitrators should meet on the 12th of *September*, after the date of the bond: therefore, the condition was, that if the defendant, his heirs, &c., should observe, &c., the award, &c., which the said arbitrators, or any two of them, should make in writing, under their hands and seals, ready to be delivered to the parties, on, or before, the first of *March* next, then the obligation to be void, &c. And the defendant then pleaded, that the arbitrators mentioned in the condition of the bond, or any two of them, did not make their award in writing, under their hands and seals, of, and concerning, the premises, and ready to be delivered to the parties, on, or before, the first of *March*, 1815.

The plaintiffs replied, that the arbitrators mentioned in the condition of the bond met at *Salem*, in the county of *Washing-*

Where there is a general demurrer to a declaration containing both good and bad counts, judgment will be given for the plaintiff.

So, where several breaches [ \* 265 ]

are assigned in a declaration, some of which are well assigned, and others not, and the defendant demurs generally, judgment will be given for the plaintiff. (a)

So, where the plaintiff assigns breaches in his replication, some of which are well assigned, and others not, and the defendant demurs generally, judgment will be given for the plaintiff.

Where part of an award, which is void, is not so connected with the rest as to affect the justice of the case, the award is void only *pro tanto*. (b)

An award requiring one of the parties to the submission to cause a third person, whom it does not appear he has any right to dispossess, to deliver the possession of land to the other party, is void.

(a) Vide *Mumford v. Fitzhugh*, 18 Johns. Rep. 457. *Wright v. Wright*, 5 Cow. Rep. 197. *Gidney v. Blake*, 11 Johns. Rep. 54. *Monell v. Colden*, infra, 395. *People v. Barton*, 6 Cowen, 290.

(b) Vide *Jackson v. Ambler*, 14 Johns. Rep. 96. *Bacon v. Wilber*, 1 Cowen, 117. *Cox v. Jagger*, 2 Id. 638. *Stanley v. Chappell*, 8 Id. 235. *Brown v. Hankerson*, 3 Id. 20. *Wright v. Wright*, 5 Id. 197.

NEW-YORK.  
May, 1816.

MARTIN  
v.  
WILLIAMS.

1 \* 265 \*

ton, on the 23d of *February*, 1815, and that two of the arbiters made their awards in writing, under their hands and seals, ready to be delivered, whereby they awarded as follows: First, That the title of the 200 acres of land in question (setting forth their boundaries) belonged to the plaintiffs, as heirs at law of *Moses Martin*, deceased, and not to the defendant, as heir at law of *John Williams*, deceased; also, that the said actions should be discontinued; and that the defendant cause the said *Wait Webster* to deliver up to the plaintiffs the possession of \*so much of the said 200 acres as was in his possession on, or before, the 7th of *April* then next; and that the defendant should pay the plaintiffs 63 dollars, being the profits of so much of the land as was in the possession of *Webster*; and 72 dollars and 35 cents, being the costs of the action of ejectment against *Webster*; and that, in like manner, he cause *Stephen Wood* to deliver up his possession to the plaintiffs, and pay them 189 dollars, for the profits of the land, and 72 dollars and 35 cents, the costs of the action of ejectment against *Wood*; and, also, that the defendant should pay to the plaintiffs 242 dollars, for the profits of so much of the 200 acres as was in the possession of *Reuben Pratt*, and 27 dollars and 29 cents, the costs of the action for mesne profits against *Pratt*; and that the defendant should pay to the plaintiffs 10 dollars and 45 cents, the costs of defending the action of ejectment, on the demise of the defendant, against *Pratt*; and that the defendant should pay to the plaintiffs the sum of 92 dollars and 12 cents, being the cost of the arbitration; the said several sums to be paid by the first day of *April* then next, with interest. Of this award the defendant had notice; and the plaintiffs aver, that the 200 acres of land, submitted to the arbitrators, are the same 200 acres described in the award; and that they were claimed by, and belonged to, some of the plaintiffs, as heirs at law of *Moses Martin*, deceased, and to the others in the right of their wives, being also heirs at law of *Martin*; and that the defendant claimed as heir at law of *John Williams*, deceased; and that *Wood* and *Webster* held under the defendant, and were his tenants, and that the actions of ejectment against them were brought, by the plaintiffs, to recover possession of so much of the said 200 acres as were in the possession of *Wood* and *Webster*, and that those actions were defended by the defendant in this suit; and the plaintiffs further aver, that, after the making of the award, the said several actions, pending in the Supreme Court, have ceased, and been no further prosecuted by the plaintiffs, or either of them, or either of their means, consent, or procurement; nevertheless, the plaintiffs further aver, &c.; assigning breaches, in which the words of the award are pursued, and the performance, by the defendant, of all the particulars of the award, severally negatived.

To this replication there was a general demurrer, and joinder in demurrer.

\**Z. R. Shepherd*, in support of the demurrer, contended, that the averments in the replication were not supported by the award. The plaintiff has endeavored to support the award by averring facts *dehors* the submission. An award is in the nature of a judgment, and must be expounded by itself.† It cannot be aided by the averment of matters extrinsic.

Again; if any part of the award is bad, it is fatal on demurrer, though the plaintiff, in his replication, assign breaches to the whole.‡

The award, in this case, is neither certain nor final. It does not appear what land, or how much, the tenants respectively held, so that it could be known how much was to be given up.

The award imposes a duty on the defendant which he cannot lawfully perform, namely, that he should cause the tenants to quit the possession. The arbitrators first award, that the defendants have no right to the land, and, next, that they should turn the tenants out of possession. An award that a stranger to the submission shall do an act, is void.§ On the same principle, an award that the party shall cause a stranger to do an act, must be void.

Again; the award directs the defendant to pay the costs of a certain suit brought by them against *Pratt*; but it ought to appear that the plaintiffs had some interest in the thing awarded.

*Crary*, contra, contended, that the averments in the replication were merely to render that certain in the submission, or award, which might, otherwise, be uncertain. They go to support the award, and do not contradict it; and the rule is, that an averment may, in some cases, be admitted to support an award.|| It is enough if there is any thing in the submission to justify the averment. Even if the averments are not supported by the submission and award, it is very questionable whether the defendant can take advantage of it. He ought to have craved *oyer*; and, after setting them forth, he may have demurred.¶

In *Adams v. Willoughby*,†† the Court said, that if, in an action of covenant, some of the breaches were well assigned, and some not, and there was a demurrer to the whole declaration, the plaintiff shall have judgment for the breaches which were well assigned.

Though things in the realty may be submitted to arbitration, they cannot be recovered on the award.‡‡ But the plaintiff \*will recover damages on the assignment of the breaches; and the value of the land is the measure of damages.

If one person submit for another, he is bound by the submission.§§

The award that the suits shall be no further prosecuted is final, and a perpetual bar.||||

*Shepherd*, in reply, said, that a party could not pay a sum in lieu of the duty awarded. The award ought to have been in the alternative, either to give possession of the land, or to pay so

NEW-YORK,  
May, 1816.

MARTIN  
v.

WILLIAMS.

† *Bac. Ab*  
*Arbit. and A-*  
*ward, (E.) 3*  
*Johns. Rep. 38.*  
*2 Johns. Rep.*  
*62.*

‡ *2 Crimes's*  
*Rep. 235.*  
*Wils. Rep. 267.*  
*Doug. 68k.*

§ *1 Roll. Ab*  
*2:0.*

|| *Kyd on A-*  
*wards, 205.*  
*1*  
*Ld. Raym. 612.*  
*(a)*

¶ *1 Chitty on*  
*Pl. 415, 416.*  
*Ld. Raym.*  
*1135.*  
*2 Saund*  
*60. n. 3. 366. n.*  
*1. 8 Johns. Rep.*  
*410.*

†† *6 Johns.*  
*Rep. 65.*

‡‡ *Ld. Raym.*  
*114, 115.*

[ \* 263 ]

§§ *Ld. Raym*  
*246.*  
*2 Crimes's*  
*Rep. 320.*

|||| *Purdy v.*  
*Delavan,*  
*Caines, 304.*

(a) *M<sup>r</sup> Bride v. Hagan*, 1 *Wendell's Rep.* 326.

NEW-YORK,  
May, 1816.

MARTIN

v.

WILLIAMS.

† 2 *Summ.*  
293, and note  
(1.) 1 *Roll. Ab.*  
259. pl. 9.

much money, being the value of it. The case of *Pope v. Brett*† supports the position, that where an award in any part is void, so that one of the parties cannot have the benefit intended, the award is void in the whole.

*Per Curiam.* Several exceptions have been taken to the award; such as, that it is uncertain, not final, and requires the defendant to do impossible acts, in obliging strangers to give up the possession of lands to the plaintiffs.

It will not be necessary to discuss or consider, with great minuteness, several of the points insisted on. If it be conceded that the award is void, so far as respects the defendant's causing *Webster and Wood* to deliver up possession of the lands they held, on the ground of uncertainty in regard to the extent of their possessions, and on the ground that the defendant is required to cause strangers to the award to do acts, still it does not follow that the whole award is bad, or that the demurrer is well taken. It is a principle thoroughly settled, that, if a declaration contain good and bad counts, and there is a general demurrer to the whole, judgment must be for the plaintiff. (3 *Caines's Rep.* 89.) Again; if a plaintiff, in his declaration, assign breaches, and some of which are well assigned, and some not, on a demurrer to the whole declaration, the plaintiff shall have judgments for the breaches which are well assigned. (*Adams v. Willoughby*, 6 *Johns. Rep.* 65.) This latter rule is strictly applicable to this case; for the plaintiffs had their election, either to bring an action of debt on the award, or to pursue the method they have adopted; in which case *Kyd* (on *Awards*, 280.) says, the whole question arises on the replication "as on an original declaration." The principle that a replication bad in part is bad in whole, is not applicable to such a case. The principle \*means substantial, constituent parts of a replication, and does not reach a case where the question relates merely to the damages a party is entitled to recover. Testing this replication by these rules, it is clearly good; the recitals preceding the submission, and the very object of the submission, show, satisfactorily, that the parties were respectively claimants, as owners of the 200 acres of land stated in the submission. The suits, in relation to which the arbitrators awarded, were distinctly submitted; the subject matter of these suits, the profits of the land, and all differences, contentions, and demands concerning them, and the costs of those suits. It was not necessary to aver, that the persons mentioned to be in possession were the tenants of the defendant; that is to be inferred from the recitals and submission; but if they were not tenants, the defendant, claiming to be the owner of the land, saw fit to submit the title, the mesne profits, and the costs of the specified suits, and he is bound by the event.

It was urged, that if the award were void in requiring the defendant to dispossess the tenants, then, inasmuch as that part

of the award which directed the suits to cease, would also fail, the award would be void *in toto*, for want of mutuality.

The delivery of possession is wholly disconnected with the cessation of the suits; they are terminated by the award, and, consequently, this award does not fall within the principle that that part of the award which is void is so connected with the rest as to affect the justice of the case between the parties; and, therefore, the award is void only *pro tanto*.

We are of opinion that the award is void as respects the delivery of possession by the tenants, for it does not appear that the defendant has the right or power to dispossess them: he is, therefore, required to cause strangers to the award to do acts which he cannot control.

Judgment for the plaintiffs, accordingly.

**\*SCHERMERHORN against HULL.**

[ \* 270 ]

IN ERROR, to the Court of Common Pleas of the county of Columbia.

This was an action of *assumpsit*, which was tried at the May term of the Court below, in 1815, and was brought to recover the value of the services of two of the plaintiff's children, a boy and girl, who went into the defendant's employ in the latter part of February, 1812, and continued with him until July, 1814, when they absconded from the defendant. To bar the plaintiff's right of action, the defendant offered to show indentures of apprenticeship by the overseers of the poor of the city of Hudson, with the consent of the mayor and recorder, binding these two children as poor of the city of Hudson, to the defendant, in the usual form. It appeared, that the plaintiff applied to one of the overseers of the poor of Hudson, for assistance, who, considering him a proper subject for relief, furnished him with a load of wood, in February, 1812, and other articles in the years 1812, 1813, and 1814; but no order for this purpose had ever been given by a magistrate. It further appeared that, in February, 1812, the defendant applied at the plaintiff's house, in Hudson, to hire the children; that the children and parents consented, and that he took them from thence; that, on the 3d of March following, the children were bound to the defendant by the overseers of the poor, without the knowledge or consent of their parents. In July, 1814, the son was discharged, by an order of three justices, from his indentures; the defendant appealed to the sessions, but abandoned his appeal; and a *habeas corpus* being allowed for the daughter, the defendant gave her up, with her indentures.

The admission of the above evidence was objected to on the part of the plaintiff, but the objection was overruled by the Court, who charged the jury that the plaintiff was entitled to

NEW-YORK,  
May, 1816.

SCHERMER-  
HORN  
v.  
HULL.

The discharge of an apprentice by an order of three justices, does not affect the validity of the indentures so as to prevent the master from setting them up as a defence in an action against him to recover the value of the services of the apprentice.

Where a person is relieved, on his own application, by an overseer of the poor, without a previous order for that purpose, this is sufficient to authorize the overseers of the poor to bind out the children of such person as poor apprentices: the want of the order only coming in question on the settlement of the overseer's accounts, and not invalidating the indentures of apprenticeship, at least so far as to prevent the master from using them as a defence in

an action to recover the value of the services of the apprentice

NEW-YORK,  
May, 1816.

SCHERMER-  
HORN  
v.  
HULL.

[ \* 271 ]

recover for the services of the children, only from the time of their going to the defendant, in *February*, until the date of the indentures, in *March*; and the jury, accordingly, found a verdict for the plaintiff for five dollars. To the admission of the evidence, and the charge of the Court, the plaintiff excepted, and \*a writ of error having been brought, the case was submitted without argument.

YATES, J., delivered the opinion of the Court. The discharge of the apprentice by the justices, under the statute, cannot affect the validity of the indentures as to any time of service rendered previous to their interference; and the master, upon that ground, cannot be prevented from defending himself in a suit like the present, by showing that there could be no indebtedness for such services, because, at that time, they were his indentured apprentices.

The act concerning apprentices and servants, (1 R. L. 138, 139.) (a) gives power to three justices, or to the mayor, recorder, and aldermen, of any city, or any three or more of them, to discharge an apprentice from his indentures, upon complaint by him made, touching any misuse, refusal of necessary provisions or clothing, cruelty, or other ill treatment; those acts, arising after the indentures are in operation, and the subsequent decision of the justices, &c., cannot deprive the master of the benefit of the services before rendered.

The 4th section of the above-mentioned act, (1 R. L. 136.) (b) gives authority to the overseers of the poor, with the consent of the mayor and recorder of *Hudson*, to bind out any child, who is, or shall be, chargeable, or whose parents are, or shall become, chargeable to the city, or shall beg for alms.

The evidence, in this case, shows that the father of the children applied to the overseers of the poor for relief, and that, in *February*, 1812, a load of wood had been given to him, and, by the account annexed to the case, it would seem, that assistance had been afforded to him both before and after the date of the indentures; it is, however, urged, that the overseer of the poor, in extending the relief asked for, had not obtained a previous order from a justice, and, therefore, all this was done by him without authority, which was necessary to make the children paupers under the act; and, unless they were so, no power existed to bind them out. I do not think that, under the act, those indentures were executed by persons having no authority; the act gives the power when alms are asked; and the father (if not a legal pauper) asked and received alms for himself and the children, and this alone was sufficient to warrant the binding, at least so far as to prevent a recovery by the father for \*the services of the children at any time after date of the indentures, and before the children were discharged by the justice. The father, at the time, was a pauper in fact, and had been

[ \* 272 ]

(a) 2 R. S. 159.

(b) 2 R. S. 155.



relieved by the overseers of the poor; and his neglect to obtain the order was an affair between him and the corporation of the city of *Hudson*, and would have been a sufficient reason for them not to have allowed the account; the order is only required to prevent imposition in expenditures of this nature, and if the corporation will allow the account, it is sufficient; the plaintiff and his family having been relieved at the expense of the city, by an overseer of the poor, on his own application, they were paupers within the meaning of the act. The Court below did right in receiving the indentures in evidence, and charging the jury that the plaintiff was entitled to recover the amount of the services rendered before the binding, and no more; and the verdict has been given according to the charge. The judgment in the Court below must be affirmed.

Judgment affirmed.

NEW-YORK,  
May, 1816.

LABAGH  
v.  
CANTINE.

LABAGH and wife *against* CANTINE and others, heirs and devisees of CANTINE.

THIS was an action of debt, on a bond executed to the wife of the plaintiff, *Labagh*, when sole, by *John Cantine*, brought against the defendants, as heirs and devisees. The defendants pleaded that they have not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, tenements, or hereditaments, by descent or devise, from the said *John Cantine*, deceased; and this they are ready to verify, &c.

The plaintiffs replied, that they ought not to be barred, &c., because they say that the defendants, after the death of *John Cantine*, and before the day of exhibiting the bill of them, the plaintiffs had divers lands or tenements, by descent or devise; and this they are ready to verify, &c.

To this replication the defendants demurred specially, showing for cause of demurrer, that the replication denies the whole \*of the defendants' plea, yet concludes with an averment and prayer of judgment for debt and damages, whereas it ought to have concluded to the country, &c. The plaintiffs joined in demurrer.

*Cantine*, in support of the demurrer, contended, that the rule of pleading was, that where there was an affirmative on one side, and a negative on the other, and no new matter alleged, the plea must conclude to the country.†

*Van Vechten*, contra, contended, that the plea was according to all the precedents. To a plea of *riens per descent*, the plaintiff may reply, either that the defendant had assets by descent, at the time of the commencement of the suit, or between that time and the death of the ancestor.‡ The act (1 N. R. L. 317.

Where, in an action of debt against heirs and devisees, the defendants plead *riens per descent*, the plaintiff replying that they had assets by descent before exhibiting the bill, may conclude with a verification.

[ \* 273 ]

† 1 *Saund.* 103.  
n. (1) 1 *Johns.*  
*Rep.* 516. 2  
*Johns.* *Rep.*  
423. 462.

‡ 1 *Chatty's*  
*Pl.* 559. 2 *Chatty's*  
*Pl.* 617  
618.

NEW-YORK,  
May, 1816.

LABAGH

v.

CANTINE.

† 2 Saund. 7.

(n. 4.) 1 Rich-  
ards's C. P.

522. 2 Rich-  
ards's C. P.  
295, 296, 297.

† 2 Roll. Abr.

71. 72. Sir

Wm. Jones, 87.

Dyer, 573. 3

Co. 12. a.

sess. 36. ch. 93. s. 2.) (a) is like the act of 3 and 4 *W. & M.* ch. 5.; and the replication given by the statute concludes with a *verification*,† and the defendant, in his rejoinder, must take issue on the allegation. This case is an exception to the general rule of pleading, as to the conclusion.

*Cantine*, in reply, said, that, in *England*, there may have been a reason for this form of replication, which does not apply here. There, though the judgment be general, only half the lands could be taken.‡ Here all the lands are liable. By rejoicing to the replication, nothing new could be put at issue which was not fully put at issue by the plea.

SPENCER, J., delivered the opinion of the Court. The defendants have demurred, specially, to the replication, because it concludes with an averment, when it should have concluded to the country.

The defendants are sued as heirs and devisees of *John Cantine*, under the statute. (1 *R. L.* 316.) (b) The plea states, "that they have not, nor at the time of the commencement of this suit, nor at any time before or since, had any lands, &c., by descent or devise, from the said *John Cantine*, deceased;" concluding with a verification. The plaintiffs reply, according to the statute, "that the defendants, after the death of the said *John Cantine*, their father, and before the day of exhibiting \*their bill against the defendants, had divers lands, &c., by descent, or devise, from their father;" concluding with a verification.

If the pleadings were tested by the principles applicable to pleadings in other cases, the demurrer must prevail; (1 *Saund.* 103. 106. 1 *Chitty*, 615., and 1 *Johns. Rep.* 516.) for it is a general and established rule, that, when there is an affirmative on one side, and a negative on the other, the conclusion should be to the country.

Cases of this description, however, seem to be an exception. The 2d section of the act before referred to, is a transcript of the 3 and 4 *W. & M.* ch. 5. sect. 5.; and it renders heirs who alien the land before suit brought, liable for the value. The 4th section of our statute, which is a transcript of the 6th section of the same *British* statute, authorizes the heir to plead *riens per descent* at the time of the commencement of the action, and the plaintiff may reply, that the heir had lands, &c., from his ancestor before commencement of such action. These statutes were intended to remedy the common-law rule, which was, that, if the heir had *bona fide* aliened the lands, which he had by descent, before the commencement of the action, he might discharge himself by pleading that he had nothing by descent, at the time of suing out the writ or filing the bill. A replication, under the statute, would not precisely meet a plea that the heir had nothing by descent at the time of the commencement

(a) 2 *R. S.* 451.

(b) 2 *R. S.* 452

of the action ; and, consequently, it has been held, that such a replication, to such a plea, must conclude with a verification ; (2 *Saund.* n. 4.) and so are the precedents. (2 *Chitty's Pl.* 473. 617.) In this plea it is alleged, that the defendants had not, at the time of the commencement of this suit, *nor at any time before or since*, any lands, &c., by descent, &c.

It would seem, that a replication that they had assets before the commencement of the suit under the statute, though it negatives one of the periods stated in the plea, must, nevertheless, conclude with a verification. The propriety of this might well be doubted, but it is sanctioned by the most approved precedents, and we think it proper to adhere to those precedents.

Judgment for the plaintiffs, with leave to amend on payment of costs.

NEW-YORK,  
May, 1816.

MARTIN  
v.  
STILLWELL

\*MARTIN *against* STILLWELL.

[ \* 275 ]

THIS was an action of slander. The declaration contained six counts. In the first four counts the plaintiff alleged a special damage, in the proof of which she failed on the trial. In the fifth count, the words charged to have been spoken by the defendant were, "Mrs. *Martin* (the plaintiff) kept a bawdy house in *George's street*," meaning a certain street in the city of *New-York*; and in the sixth count, the words charged were, "she kept a bawdy house in *George's street*." At the trial, before Mr. Justice *Platt*, at the *Essex* circuit, in *June*, 1815, a verdict was found for the plaintiff on the two last counts; and it was now moved to arrest the judgment, on the ground that the words were not actionable.

Charging the plaintiff with keeping a bawdy house is actionable in itself, this being an indictable offence, involving moral turpitude. (c)

*Skinner*, in support of the motion.

*Z. R. Shepherd*, contra.

*Per Curiam.* In *Brooker v. Coffin*, (5 *Johns. Rep.* 191.) on demurrer to the first count in the declaration, &c., the words were, "She is a common prostitute, and I can prove it;" and this Court decided that those words were not actionable. The law, as to what words are actionable, is settled in that case, and the following rule was laid down as the safest, and one which the cases warranted, viz. "In case the charge, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words would be, in themselves, actionable."

If this rule is to govern the decision in this cause, then the present motion must be denied, because there is no doubt that keeping a *bawdy house* is a common nuisance, and that the person keeping it is liable to an indictment. The words here, as laid in the 5th and 6th counts of the declaration, are, "Mrs.

(a) Vide *Widrig v. Oyer*, *supra*, 124. *Demarest v. Harding*, 6 *Cowen*, 76.

NEW-YORK,  
May, 1816.

COOK

v.

HOWARD.

[ \* 276 ]

*Martin* kept a bawdy house in *George's street*." "She kept a bawdy house in *George's street*," which words (if true) would have subjected her to an indictment; and, although the punishment for this offence could not have been infamous, yet, according \*to the above rule, it would have been for a crime evidently involving moral turpitude: these words are, consequently, in themselves actionable, and the motion in arrest must be denied.

Motion denied.

### Cook against Howard.

A capture, and a immediate recapture, does not divest the property of the original owner.

Property taken in a battle on land does not vest in the captor, at least until after the termination of the battle; and if it be taken during the battle, the title of the original owner is not divested.

Plunder taken from the enemy, in a war on land, belongs to the sovereign of the captor.

Where a horse, belonging to the *United States*, was taken by the enemy, and shortly after retaken by the plaintiff, who continued in the

[ \* 277 ]

possession until it was taken from him by the defendant, an officer in the army of the *United States*, acting under the orders of a superior officer; it was held, that the plaintiff could maintain an action of trespass against the defendant to recover the value of the horse, no authority from the *United States*, to take the horse, having been shown by the defendant; and it is to be presumed, until the contrary be shown, that the *United States* never intended to interpose any claim to the property.

In trespass, *de bonis asportatis*, the defendant cannot show property in a stranger; although it is otherwise in trover. (a)

(a) Aikin ads. *Buck*, 1 *Wendell's Rep.* 466. *Marsh v. Berry*, 7 *Cow. Rep.* 344. *Hurd v. West*, 7 *Cow. Rep.* 752.

IN ERROR, to the Court of Common Pleas of the county of *Niagara*.

This was an action for trespass, *de bonis asportatis*, for taking a horse belonging to the plaintiff. The defendant pleaded, 1. Not guilty. 2. That the horse was the property of the *United States*, and that one Major *Garner*, of the 25th regiment of *United States'* infantry, and senior officer and commandant, commanded the defendant, being a captain in the said regiment, to take the horse, and deliver him to the quarter-master of the regiment; that the defendant took the horse, by virtue of such order, and delivered him to the quarter-master, which are the same, &c. To the second plea, the plaintiff, protesting, &c., replied, that the defendant took the horse of his own wrong, and traversed that the *United States* were lawfully possessed of the said horse.

The cause was tried in the *February* term, 1815, of the Court below, and it was proved on the trial, that the horse in question had, previously to the 19th of *December*, 1813, been delivered to one *St. John*, (who then acted as a wagon master,) by a deputy, or assistant quarter-master general of the *United States*; that, on the 19th of *December*, when the enemy drove the inhabitants from *Lewiston*, the horse was taken from *St. John*, by an *Indian* in the service of *Great Britain*; that, immediately \*after taking him, the *Indian*, on the horse, pursued the plaintiff, who, with others, was fleeing from the enemy; that the plaintiff discharged a gun, or musket, at the *Indian*, who fell from the horse (as was believed) dead; that the plaintiff shortly after took the horse, and kept him in his possession until the month of *April*, 1814, when the defendant, being an officer of the *United States'* army, acting in pursuance of an order from an officer commanding a detachment of *United States'* troops, stationed near where the horse was kept, took the horse from a

stable, and informed the plaintiff that he had taken the horse as the property of the *United States*.

The Court below charged the jury that the defendant could acquire no property in the horse until adjudication, by a Court of the *United States*, and that the defendant was justified in taking the horse, the commandant of the detachment having a right to give the order which he did. The jury found a verdict for the defendant below; and a bill of exceptions having been tendered, by the plaintiff, to the opinion of the Court, the cause was removed into this Court by writ of error.

NEW-YORK,  
May, 1816.

COOK  
v.  
HOWARD

*N. Williams*, for the plaintiff in error, contended, 1. That, by the capture and recapture, the property in the horse, by the common law, became vested in the plaintiff. There is a difference between the law of nations and the *common law*, on this subject. By the latter, the *subject* was entitled to goods taken from an enemy of the king, in time of war.† He who takes such goods from the enemies of the king, which were before taken from an *Englishman*, shall have it, as a thing gained in battle, and not the king, the admiral, nor the party to whom the property was before, because the party did not come freshly the same day it was taken from him, and before sunset, and claim it.‡ This is the common law of *England*. It is also the law of war, in ancient and modern times. It is a principle of public policy. The question is to be decided rather by the common law than the law of nations; but the law of nations, on this subject, is no less clear and decisive. A recapture is considered as a capture from the last possessor, and the last captor acquires the right of property in the goods taken. It is true most of the writers lay it down, that the right of *postliminium*, in regard to movables, continues during twenty-four hours after the capture; and such seems to be the generally-received principle, \*though some writers even contend, that the booty must be carried *intra præsidia*, before the property is changed.§ *Vattel* says, that the property, in movables, is acquired the very moment they come into the power of the enemy, and if he sells them to neutrals, the first proprietor has no right to reclaim them. (a) The space of twenty-four hours, as well as the custom of the sea, in this respect, is an institution of the *pactitious* or conventional law of nations, or of custom, or, in short, of the civil law of certain states. It is not, then, a principle of the universal law of nations, that the goods must remain twenty-four hours in the possession of the captor before the property is changed. And the civil, or *common law* of *England*, has settled this question as to goods taken from an enemy on land. *Blackstone*|| lays down the rule already mentioned, that "if an enemy take the goods of an *Englishman*,

† 1 *Wils. Rep.* 213. *Morrow v. Comyns*, per *Wright, J. Regist.* 102. b. *Bro. tit. Property*, pl. 18. 38.

‡ 18 *Vin. Ab.* 67. *tit. Property*, (D.) pl. 3. note. *Br. Forfeiture*, pl. 57. *Id. Chattels*, pl. 22. *Id. Property*, pl. 38. 7 *Ed. IV.* 14. S. C. cited 1 *Vent.* 174.

[ \* 278 ]

§ 2 *Azuni. Mar. Law.* 275, 276. *Vattel, B.* 3. c. 13. s. 196. *Martens. B.* 8. c. 3. s. 11, 12. *Chitty's L. of N.* 98.

|| 2 *Bl. Com.* 40]

(a) *La propriété des choses mobilières est acquise à l'ennemi du moment qu'elles sont en sa puissance; et s'il les vend chez des nations neutres, le premier propriétaire n'est point en droit de les revendiquer. Droit des Gens.* lib. 3. ch. 13. s. 1:6.

NEW-YORK,  
May, 1816.

COOK  
v.  
HOWARD.

† See *Thomson's Hist. lib.*  
13

† *Chitty's L. of N.* 98, 99.  
*Flad. Oyen*, 1  
*Rob. Adm.* 134.  
3 *Rob. Adm.*  
236, 237, 238.

§ 1 *Johns. Rep.* 482.

|| 3 *Bl. Com.*  
106. 108.

¶ *Doug. Rep.*  
614. note.

[ \* 279 ]

†† *Wils. Rep.*  
212.

†† *Grot. de Jur. B. et P. lib.*  
3. c. 6. s. 3.

which are, afterwards, retaken by another subject of the kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker, unless they were retaken the same day, and the owner, before sunset, put in his claim of property." And this, he says, was agreeable to the law of nations, as understood in the time of *Grotius*, even as to captures at sea. The only case to be found in any writer, is that mentioned by *Vattel*, of the town of *Lierre*, which was taken and retaken on the same day.† The claim put in, in this case, was not until six months after the recapture.

2. As to the necessity of *condemnation*, it is not denied, in regard to *maritime* captures, that it may be necessary to confirm the property in the captor. Such appears to be the law as understood in *England*† and in this state.§ But, as to captures on land from a public enemy, they are not the proper subjects for judicial proceedings, by libel and condemnation. No maritime Court can have jurisdiction in such a case.|| In *Le Caux v. Eden*,¶ Lord *Mansfield* observed, that "as to plunder, or booty, in a mere continental land war, without the presence or intervention of any ships, or their crews, it never has been important enough to give rise to any question about it. It is often given to the soldiers on the spot; or wrongfully taken by them, contrary to military discipline. If there be any dispute, it is \*regulated by the commander-in-chief. There is no instance in history or law, ancient or modern, of any question, before any legal judicature, ever having existed about it in this kingdom."

Suppose, however, that an adjudication of some Court is necessary to confirm the property of the captor; shall not his possession be, in the mean time, protected? He has, at least, an *inchoate* right of property, which cannot be divested by force.††

3. But what authority had the defendant, in this case, to seize the horse? Has every military officer power to take, by force, from the possession of a citizen, the property even of the *United States*? It would be a most dangerous and oppressive power, if it existed; but the authority of the defendant to touch this property is wholly denied. If any officer had that power, it must be a *quarter-master* of the army, who has the superintendence of the public property, in war, of the *United States*, and who gives security for the faithful performance of his duty. If, then, this defendant had no authority to seize, he has been guilty of a trespass.

*Hawley*, and *Parker*, contra. The capture of the horse, in this case, was followed, almost immediately, by a recapture. The capture by the hostile *Indian* did not transfer the property to him. This case must be decided by the law of nations. *Grotius*†† lays down the rule on the subject: "Things are said to be taken in war, when they are so detained, that the first owner has lost all probable hopes of recovering them, and can-

not pursue them." And he explains that, when, in other places, it is said that goods taken belong *immediately* to the captors, (a) it is to be understood that they continue so long in their possession that the hope of recovering them is gone. The rule, as to 24 hours' possession, he calls a new or modern doctrine. *Bynkershoek* recognizes the same rule, that the property is not changed, until the owner has lost the *spes recuperandi*; and that is not until the property is carried into a place of safety.† *Puffendorf*,‡ also, accedes to the rule of *Grotius*; and *Vattel*,§ when he says, that the property of movables belongs to the enemy the moment they come into his power, adds, but such things must be actually and truly in the enemy's power, and carried to a place of safety. (b)

\**Blackstone*|| does not differ from *Grotius*, as to the law of nations laid down by him and other writers. He does not, however, state the case from the *Year Book* (7 *Edw.* IV. 14.) correctly, and it is the same case which is cited in *Brooke*. The condition is, that the original owner must come freshly or promptly, the same day, to claim his property of the captor. Nothing is said of the *recaptor*. In *Goss v. Withers*¶ may be found all the law on the subject, and, also, the case from the *Year Book*, in its original language. Lord *Mansfield* says, that the general proposition, that what is taken from an enemy *immediately* becomes the captor's, is to be understood, when *the battle is over*; and that is not until all immediate pursuit has ceased, and all hope of recovery is gone. But he says that the rule has been made still more favorable to the owner, in the case of maritime capture, and the property is not changed until there has been a sentence of condemnation; and this principle was adopted by this Court, in the case of *Wheelwright v. Depeyster*.†† The possession of the horse, in this case, by the *Indian*, was temporary; the battle was not over; the conflict still continued. If the property were not divested by the capture, the *jus postliminii* still remained in the *United States*, the original owner. This right takes place, according to *Vattel*,‡‡ "as soon as the things taken by the enemy fall into the hands of soldiers belonging to the same nation, or are brought back to the army, within their sovereign's territories, or the places under his command."

Again; admitting that the *Indian* acquired a property in the horse by the taking, the retaking by the plaintiff enures to the government of the *United States*, whose servant or agent he is, and under whose authority he acts. For *Puffendorf* and *Vattel* both lay it down, that all things, *booty* as well as immovables, taken from the enemy, belong to the sovereign making the war.§§

NEW-YORK,  
May, 1816.

COOK  
v.  
HOWARD

† *Bynkershoek. Quæst. Jur. Pub. lib. 1. c. 4.*

‡ *Puff. L. of N. and N. lib. 8. c. 6. s. 20.*

§ *Liv. 3. c. 13. s. 196.*

[ \* 280 ]  
‡ *Bl. Com. 401, 402.*

¶ *2 Burr. Rev. 605.*

†† *1 Johns. Rep. 471.*

‡‡ *Droit des Gens. liv. 3. c. 14. s. 215.*

§§ *Puff. L. of N. and N. b. 8. c. 6. s. 21. Vattel, 1. 3. c. 9. s. 164.*

(a) *Dig. 41. 1. Item quæ ex hostibus captantur, jure gentium statim, capiendum sunt.*  
(b) *Mais il faut que ces choses la. soient véritablement au pouvoir de l'ennemi, et conduites en lieu de sûreté. Roccus says, " Ut res capta ab hostibus efficiatur ipsorum hostium duo requiruntur: Primum, quod navis capta ducatur intra præsidia ipsorum hostium, ad ad eorum confines: Secundum, quod ita ducta, ut sit in tuto, nec a militibus occurrentibus molen's recuperari possit, et penes eos pernoctari." De Assecur: Not. 66.*

NEW-YORK,  
May, 1816.

COOK  
V.

HOWARD.

† A report of  
the case, in the  
[ \* 281 ]  
*National Intel-  
ligencer*, of July  
22, 1825, was  
read by the  
counsel.

Soldiers are but instruments in his hands for asserting his rights.

This principle was recognized by Judge *Toulman*, of the *Mississippi Territory*, in the case of the *United States v. The schooner Active*, tried before him.†

This principle equally applies to a recapture, notwithstanding \*the cases cited from 1 *Wilson* and the *Year Book*; for war is the act of the sovereign or government, whose exclusive right it is to carry it on. No individual can have the right; and if a citizen takes up arms, he acts in subordination to the sovereign.

But it is said, that the defendant had no authority to take the horse from the plaintiff. It is enough that he acted in pursuance of the orders of his commanding officer. It is the duty of every officer of the army to take care of the public property, and a request from the quarter-master may be presumed, or the defendant may be considered as quarter-master, *pro hac vice*.

*N. Williams*, in reply, said, that the case before Judge *Toulman* was that of a capture by soldiers, which was different from the present case of a taking by a private citizen. When war is declared, every citizen is at war with the enemy; and was it ever heard that the government has claimed goods taken from an enemy by its citizens? Captures on land from an enemy, *eo instanti*, change the property. (a) The law as to maritime captures is not applicable to this case; and Lord *Mansfield*, in *Goss v. Withers*, observes, that writers have drawn lines by arbitrary rules; and many arbitrary circumstances, deemed necessary by them to change the property, have been exploded. That was a case of *insurance*, and decided on the rule as to maritime captures. But admitting the loss of the *spes recuperandi* to be the criterion, it must depend on circumstances; and if this case be tried by that rule, what means of recovery could there be, when the *Indian* was in full possession of the horse, and the owners had abandoned it? It is a principle of the civil law, and of the *jus gentium*, that what we take from an enemy in war becomes instantly our own.‡ How is the doctrine of the things taken being carried *intra præsidia* of the enemy, to be applied to our *Indian* warfare? But we rest on the common law; and, according to the case cited from the *Year Book*, in *Goss v. Withers*, and to be found in all the *abridgments*, the owner must, *promptly*, or \*freshly, and before sunset, pursue and claim his property, or his right to it is forever gone. The law must be the same, whether it be a case of recapture or capture. The principle and the reason of it are the same. As between our citizens, the common law must be the rule of decision.

(a) *Voet* (*ad Pandect. lib. 49. tit. 15. s. 3.*) does not agree with *Grotius* and others, that it is necessary to carry booty taken from an enemy, *intra præsidia*, in order to vest the property in the taker. "*Verius tamen*," he says, *etiam ante per solam occupationem dominium prædæ hostibus, acquiri, &c.* And Lord *Mansfield*, in the case cited, seems to incline to the opinion of *Voet*; but he very justly observes, that it is no wonder there is so great uncertainty and variety of notions among writers, about fixing a positive boundary, by the mere force of reason, where the subject matter is arbitrary, and not the object of reason alone.

1 *Just. Inst.*  
lib. 2. tit. 1. s.  
17. (*Cooper's*  
ed. p. 73.)

[ \* 282 ]



THOMPSON, Ch. J., delivered the opinion of the Court. If the right of the plaintiff below to maintain this action depended upon the abstract question, as to the right of property, I am satisfied he must fail. It is necessarily to be inferred, from the bill of exceptions, that the property in the horse was, at the time he was taken by the enemy, duly vested in the *United States*. And it is very clear that it was not divested by any thing that took place at the time he was taken by the *Indian*. It is a proposition not to be controverted, that no right could arise from the recapture, unless the property had vested in the captors. Whatever difference of opinion there may have been among the writers on public law, as to the time when, or what is necessary to take place, in order to vest the property in the captors, no approved jurist has gone so far as to maintain, that a mere capture is sufficient for that purpose. It has been generally held, that the property must be carried *intra prasidia*, or remain twenty-four hours in the hands of the captors, or that the *spes recuperandi* must be gone, or that an actual condemnation must take place. But in the case before us, there could hardly be said even to have been a capture. In *Goss v. Withers*, (2 Burr. 693.) Lord *Mansfield* observed, that nothing could be said to be taken until the battle was over; and this is not until all immediate pursuit has ceased, and all hope of recovery is gone. That was not the case here. The interval between the capture and recapture must have been very short, and during the continuance of the battle. The property in the horse could never, under such circumstances, be considered as vested in the captors. If so, the recapture could not vest it in the plaintiff.

But, admitting the right of property had vested in the captors, the better opinion is, that, upon the recapture, it would have belonged to the *United States*. The rule laid down by *Vattel* (b. 3. ch. 9. s. 164.) is the rational one. He says, as the towns and lands taken from the enemy are called conquests, so all movable things constitute the *booty*, and this booty, naturally, belongs to the sovereign making war, no less than the conquests; \*for he alone has such claims against the enemy as to warrant him to seize on his goods, and appropriate them to himself. His soldiers are only instruments in his hands, and whatever they do is in his name, and for him, and he may grant them what share he pleases. Lord *Mansfield*, in *Le Caux v. Eden*, (Doug. 614. n.) said, that as to plunder or booty in a mere land war, without the intervention of ships, or their crews, it never had been important enough to give rise to any question about it. It is often given to the soldiers upon the spot, or wrongfully taken by them, contrary to military discipline; and, if there be any dispute, it is regulated by the commander-in-chief. He asserts, that there is no instance in history or law, ancient or modern, of any question, before any legal judicature, ever having existed about it in *England*; and he goes on to observe, that it does not come within the prize jurisdiction.

NEW-YORK,  
May, 1816

COOK  
v.  
HOWARD

[ \* 233 ]

NEW-YORK,  
May, 1816.

AUSTIN  
v.  
HALL.

his two sons, *Robert* and *Nelson*. This deed was duly executed by the grantor, in his lifetime, and delivered to a third person, to be delivered to the grantees, in case the grantor should die before having made and executed his will. The grantor did die without having made any will, and the deed was, after his death, delivered to the grantees. If this deed is to be considered as an *escrow*, the estate, under the circumstances stated in the case, passed to the grantees, upon the delivery after the death of the grantor. It is a well-settled rule with respect to an *escrow*, that, if either of the parties die before the condition is performed, and, afterwards, the condition is performed, the deed is good, and will take effect from the first delivery. (*Shep. Touch.* 59.) It may, however, be questionable whether this deed is to be viewed as an *escrow*; the grantees had nothing to do, on their part, in order to make the deed absolute, which is usually the case where a deed is delivered as an *escrow*. The delivery here was, at all events, conditional, and to become absolute upon an event which has taken place; and, as in the case of an *escrow*, the deed will take effect from the first delivery. This principle is very fully laid down and illustrated in the cases of *Wheelwright v. Wheelwright*, and *Hatch v. Hatch*, (2 *Mass. Rep.* 447., and 9 *Mass. Rep.* 307.) The grantees in this deed are, therefore, entitled to a moiety of the premises, and partition must be made accordingly.

### AUSTIN and others against HALL.

Where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action.

So, in an action by tenants in common for a trespass on land of which they are the co-heirs, a release

[ \* 287 ]  
by one of the plaintiffs is a bar to the action. (a)

Tenants in common must join in an action of trespass *quare clausum fregit*. (b)

THIS was an action of trespass, *quare clausum fregit*, against the defendant and one *Ely*, for entering upon the lands of the plaintiffs, expelling them from thence, and taking the issues and profits.

The defendant pleaded not guilty, and *liberum tenementum*; and the plaintiffs new assigned the *locus in quo* on which the trespass was alleged to have been committed. To the new assignment, the defendant pleaded, 1. Not guilty: 2. A release, under seal, from *Edward Austin*, one of the plaintiffs, in consideration of the sum of six cents, of all actions, and causes of action, and demands, which the said *Edward Austin*, or which he and any other persons, had against the defendant and *Ely*; (except his share of his father's personal property, to whom the defendant was administrator;) and, particularly, all demands on account of any trespasses done by the defendant to any real property owned or claimed by the said *Edward Austin*, and the other heirs of his deceased father; and, also, the suit lately commenced against the defendant and *Ely* by the said *Edward Austin* and his coheirs. And the defendant averred, that the

(a) *Fitch v. Forman*, 14 *Johns. Rep.* 172. *Decker v. Livingston*, 15 *Johns. Rep.* 479.

(b) *Shuman v. Ballou*, 8 *Cov. Rep.* 304. *Decker v. Livingston*, 15 *Johns. Rep.* 479. *Low v. Mumford*, 14 *Johns. Rep.* 426.

real property mentioned in the release was the same as that described in the new assignment of the plaintiff; that the said *Edward Austin*, and the other heirs of his deceased father, were the plaintiffs in this suit; and that the suit mentioned in the release and the present action were the same. 3. A release, in like manner, from *Joseph Austin*, another of the plaintiffs. To the second and third pleas there was a general demurrer, and joinder in demurrer.

NEW-YORK,  
May, 1816.

LAURENCE  
v.  
HOPKINS.

*Z. R. Shepherd*, in support of the demurrer, cited *Cro. Eliz.* 411. 2 *Cro. 68.* *Co. Litt.* 197. *b.* 1 *Salk.* 260. *Cro. James*, 231. 2 *Bl. Rep.* 1077. 2 *Burr.* 663.

*D. Russell*, contra, cited *Cro. Eliz.* 648. *Bac. Abr. Release*, (G.) 6 *Co.* 35. 1 *Lev.* 272. 1 *Ld. Raym.* 648, 649. *Co. Litt.* 285. *a.*

*Per Curiam.* The declaration, in this case, is for a trespass on land, and an eviction of the plaintiffs; and for the damages sustained by reason thereof this suit is brought. The action is, strictly, a personal one, and the plaintiffs were bound to join in it. The release, therefore, by two of the plaintiffs, is a bar to the action, and the defendant is entitled to judgment.

Judgment for the defendant.

### \*LAURENCE against HOPKINS.

[ \* 288 ]

THIS was an action on a joint and several promissory note, of which the defendant was one of the makers, dated the 7th of October, 1803, payable to *Ebenezer Whiting*; or order, four years after date, for 152 dollars and 52 cents, and endorsed by the payee to the plaintiff. The defendant pleaded the general issue, and *non assumpsit infra sex annos*, to which the plaintiff replied. The cause was tried before Mr. Justice *Platt*, at the *Schenectady* circuit, in November, 1815.

The plaintiff was nonsuited at the trial upon a variance between the note given in evidence and the declaration. The parties, in making up the case, agreed to submit to the Court the following testimony in relation to the defence of the statute of limitations; which was, that the defendant, in a conversation with one witness, stated, that he had been lately sued upon a contract made with *Whiting*, and that, by the terms of the contract, he had never considered himself holden to pay any thing; and that his counsel had advised him that the contract could not be enforced at law; and that, in a conversation with another witness, upon the witness mentioning that he had attempted to settle with the plaintiff, upon the note, and had offered him

To take a demand out of the statute of limitations, there must be a promise express or implied.

And no promise can be inferred from a declaration of the defendant, that he was not holden to pay any thing, and that the contract could not be enforced at law; and that he never would pay any thing, as it was an unjust debt. (a)

An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the statute of limitations.

(a) Vide *Murray v. Coster*, 4 *Conn. Rep.* 617. *Mosher v. Hubbard*, 15 *Johns. Rep.* 570. *Sands v. Gelston*, 15 *Johns. Rep.* 511. *Johnson v. Beardslee*, 15 *Johns. Rep.* 3. See also the cases of *Bradley v. Field*, *Purdy v. Austin*, 3 *Wendell*, 272. 187. *Hancock v. Bliss*, 7 *Wendell*, 261., and *Pinkerton v. Bailey*, 8 *Wendell*, 600.

NEW-YORK,  
May, 1816.

TOMB  
v.  
SHERWOOD.

twenty-five dollars on behalf of the defendant, to be in full of the note, which the plaintiff refused to accept, the defendant replied, that he was sorry any such offer had been made, as he never would pay one cent on the note, as he considered it an unjust debt.

The case was submitted to the Court without argument.

*Per Curiam.* The evidence is not sufficient to take the case out of the statute of limitations. It neither shows an express or implied promise to pay the debt; but, on the contrary, it appears that the defendant uniformly considered the demand as unjust from the beginning, and that he was under no obligation to pay it. To infer a promise to pay, in direct opposition to the defendant's denial of the justice and fairness of the debt, would be trifling with the statute. The proposition to give 25 dollars to settle the demand must be laid out of the case, because that was a mere peace-offering, and being rejected, it cannot prejudice the defendant.

Judgment for the defendant.

[ \* 289 ]

\*TOMB, *qui tam*, &c. against SHERWOOD.

Where a person undertakes to sell land which is held adversely to him, it is immaterial whether his title or claim were good or bad, and the parties to such sale will be equally within the statute against champerty and maintenance.

So, where a person obtained a certificate from the surveyor-general of the state, that he purchased a lot of land, and the land was then sold under an execution against him, and he, afterwards, assigned the certificate; it was held that the assignee was liable to the penalty of the statute.

And the value to be recovered is not only that of the land actually occupied and cultivated, but of the whole lot of which it is parcel, and which is claimed in connection with it. (b)

THIS was an action of debt brought against the defendant on the 8th section of the act "to prevent and punish champerty and maintenance," (1 N. R. L. 172.) (a) for buying the pretended right, or title, of one Mooney, to the south half of lot No. 50, in the late Oneida reservation, in Sullivan, in the county of Madison. The cause was tried before Mr. J. Van Ness, at the Madison circuit, in July, 1815.

A certificate of sale, dated the 7th of August, 1806, was issued by the surveyor-general of the state to Mooney, which stated that he had purchased a piece of land in the town of Sullivan, distinguished as lot number fifty, in the northwesterly part of the late Oneida reservation, containing 231 acres; on which lot 125 dollars were paid, the sum of 875 dollars remaining due. This certificate Mooney, for the consideration of 50 dollars, assigned to the defendant, in fee, on the 17th of April, 1814. The south half of the said lot was levied upon and sold, under a judgment and execution against Mooney, to one Job Williams, and the deed from the sheriff was dated the 5th of November, 1807. Williams permitted Mooney to remain in possession after the sale, for about one year, on his promising to surrender the possession to Williams, and deliver him the certificate. He delivered the possession, but retained the certificate. On the 4th of September, 1810, Williams conveyed to one Foot, in fee,

(a) 2 R. S. 691.

(b) Vide note (a) to *Teele v. Fonda*, 7 Johns. Rep. 251.

and Foot conveyed to the plaintiff, and Samuel, his son, by deed, which was not dated, but which was proved to have been delivered in the fall of 1813. After the plaintiff's purchase, the defendant, by threats to dispossess the plaintiff, obtained from him a judgment bond for 200 dollars, as a consideration for relinquishing the certificate to him, and the like sum from one Peck, the owner of the north half of the lot. It was proved that the defendant, at the time he took the assignment from Mooney, was fully aware of the nature of his title. There were about 20 acres of the land in question improved. The house and improved land were worth 400 dollars; the value of the south half of the lot was 1,000 dollars.

\*The jury found a verdict for the plaintiff, subject to the opinion of the Court as to his right to recover, and as to the amount of the recovery—whether the verdict should be for 400 or 1,000 dollars.

Storrs, for the plaintiff, contended, that the purchase made by the defendant was of a pretended right or title, within the statute. The act of the 6th of April, 1803,† required the surveyor-general to give to each purchaser a certificate, containing a description of the land purchased, and the price; on the production of which, with an endorsement of the payment of the purchase money, he was entitled to a patent. This is a "promise, grant, or covenant, to have a right or title," which the act to prevent champerty and maintenance,‡ prohibits any person out of possession from buying or selling. It is not necessary that it should be a fee. The statute extends to any right or title.§ A lease by a person having a mere covenant for a conveyance, is within the act.||

Randall, contra, contended, that, if the defendant had been guilty of any offence, it was against the first section of the act against maintenance. The certificate of the surveyor-general was a mere *chase in action*, and the purchase of it was not buying any right or title. It conveys nothing. It is a mere engagement that, on the performance of certain things, the person shall be entitled to demand a patent. The commissioners of the land office alone could give any title; and by the 9th section of the act, if the purchaser failed in completing the payments, all previous sums paid are forfeited, and the land may again be sold. A bond, or covenant, for a conveyance, does not give a right of entry on the land.¶ In *England*, there are no cases in which the action has been sustained, unless where the purchase has been such as, *prima facie*, conveyed the title. The certificate was not under seal, and could convey no title. Every right includes a title.†† Here was a mere assignment of the certificate.

Again; as to the amount of the recovery. The plaintiff was proved to be in possession of about 20 acres of improved land.

NEW-YORK,  
May, 1816.

TOMR  
v.  
SHERWOOD

[ \* 290 ]

† *Sess. 26. ch.*  
*106. s. 7. vol. 3.*  
*Laws, 365.*  
*Wehster's ed.*

‡ *1 N. R. L.*  
*172. sess. 24. ch.*  
*87. s. 8. (a)*

§ *2 Hawk. P.*  
*C. 420. b. 1. ch.*  
*86. s. 12. 4 Co.*  
*26. Co. Litt.*  
*369.*

|| *15 Vin. Ab.*  
*149. Maint. (B.)*  
*pl. 7. p. 157.*  
*(E.) . 25*

¶ *9 Johns*  
*Rep. 35. 331.*

†† *Co. Litt*  
*345. b.*

NEW-YORK,  
May, 1816.

TOMB  
v.  
SHERRWOOD.

[ \* 291 ]

† 1 *Johns.*  
*Rep.* 346. 5  
*Johns.* *Rep.*  
500, 501. 7  
*Johns. Rep.* 281.

† 1 *Caines's*  
*Rep.* 84. 358.

The residue was vacant. The defendant could be liable only for lands he knew to be in the possession of another, or for such land as was improved; not for vacant land, or such as was in \*the constructive possession of the plaintiff. The conveyance of a title to land held adversely, is void only as to the land possessed adversely, and is good as to the residue; and the defendant, in an action on the statute for buying a pretended title, is answerable for no more than the value of the land in actual possession.†

*Storrs*, in reply, said, that, by "title," was not meant a fee. It is the means by which the party is to acquire the possession. It includes any right or interest whatever. Possession of a part, with a claim to the whole of a tract of land, is a sufficient adverse possession of the whole.†

VAN NESS, J. The plaintiff was in possession of the land, under a deed in fee given upon a valuable consideration, occupying and improving it as his own; and while he was thus in possession, and, which is equally important, while *Mooney* was out of possession, the defendant purchased the equitable interest claimed by *Mooney* under the surveyor-general's certificate. It is material to observe, that, long before the defendant's purchase, *Mooney* voluntarily surrendered the possession of the land to *Williams*, under whom the plaintiff claims, after having been *Williams's* tenant for a year. Two questions arise upon the merits of this case. 1st. Whether the purchase by the defendant was of a pretended right or title within the statute; and, 2nd. If it is, what shall be the amount of the recovery, 400 dollars, or 1,000 dollars?

1st. The words of the statute are, that no person shall buy or sell *any pretended right or title*, or make, or take, any promise, grant, or covenant, to have *any right or title* of any person to any lands, &c. Under this statute, it is well settled that it is immaterial whether the right or title purchased, or sold, be good or bad; for if it be ever so good, if the vendor is not in possession, nothing passes by the deed, and the case comes within the statute. It has also been held, that the sale of a copyhold estate, or giving a lease for years, when the vendor or lessor is not in possession, is within the statute. Lord *Coke* says, "The words of the statute be, *any pretended right*, and, therefore, a lease for years is within the statute; for the statute saith not *the right*, but *any right*, and the offender shall forfeit the whole value of the land." And again; "Also the statute speaks of *any right or title* to any \*land. A customary right, or a pre-  
[ \* 292 ]  
tence thereof, to lands holden by copy, is within this statute." (*Co. Litt.* 369. a. and b.) The statute intended to prohibit the sale of pretended rights, by which the possession of another might be disturbed. And it appears to me that a purchase like the present is fully within the meaning and spirit, as it indisputably is within the words of the act. The defendant, by  
244

getting possession of the surveyor-general's certificate, and the assignment of it by *Mooney*, had it in his power, perhaps, to defeat the plaintiff's right, or, at all events, to give him great trouble and vexation in perfecting his title. It was a dormant and abandoned claim of *Mooney*, which the defendant bought for the express purpose of harassing the plaintiff, and to disturb his right and possession. The case shows, that, by virtue of this very purchase, the defendant extorted a considerable sum of money from the plaintiff, by threatening to dispossess him.

NEW-YORK,  
May, 1816.

TOMB  
V.  
SHERWOOD

2d. We have more than once decided that when a person entered, and was in possession, under an agreement to purchase an entire lot or piece of land, and cultivated and improved a part, claiming the whole as his own, that he was to be deemed to be in the actual possession of the whole, and that a deed given by a stranger, though he had a good title, was inoperative. The assignment in this case is of the whole lot described in the surveyor-general's certificate; and there is no pretence for saying that *Mooney* was in possession of any part of it. He had, in fact, actually surrendered the possession to *Williams*, long before the defendant purchased from him his pretended right. The defendant was fully apprized of the actual situation of the lot, and bought it with full knowledge of the plaintiff's rights. I do not see, therefore, upon what ground it can be contended that the defendant is not liable for the value of the entire lot, if he is liable at all. I am of opinion, therefore, that the plaintiff is entitled to judgment for 1,000 dollars, being the value of the whole lot, as found by the jury.

THOMPSON, Ch. J., and YATES, J., were of the same opinion.

SPENCER, J., dissented, observing, that the case presented facts establishing a fraud, rather than an offence against the statute. It is conceded, that, be the title ever so valid, if the lands be held adversely to that title, it would be champerty to purchase \*such valid title; but if the title purchased be valid, and the land is held under, or subservient to, that title, it would not be champerty. It is held not to be sufficient to show that the seller had not been in possession a year before, without averring that he had a pretended right or title, because that is the point of the action. (2 *Hawk.* b. 1. ch. 86. s. 10:)

[ \* 293 ]

The intent of the statute was to prevent any person, having a disputed title, from conveying it to strangers. (*Bac. Abr. Maintenance*, E.)

Here we are warranted in saying, that the plaintiff knew that the lands had been taken up by *Mooney*, under the surveyor-general's certificate, and that it was sold under the *fi. fa.* against *Mooney*, in subserviency to that right; and we must say, that the plaintiff acquired, by his purchase, the bare right of possession, subject to the right of the state. This is, then, not a case within the purview of the statute: the right of the state was not a pretended right; for the plaintiff held under the state

NEW-YORK,  
May, 1816.

DE RIDDER  
v.  
M'KNIGHT.

without any title, and not having acquired by his purchase a right to grant.

Again; the defendant taking an assignment of the surveyor-general's certificate was not taking a *promise, grant, or covenant to have any right or title*; the operation of law might be, that he would obtain a grant by the production of the certificate and the payment of the price of the land, yet it was not in itself a *promise, grant, or covenant*, that he should have the land. This is a penal statute, and to bring the defendant within it, he must be brought within the very terms. I cannot view the case as within either branch of the statute, and, therefore, think the defendant is entitled to judgment.

PLATT, J., was of the same opinion.

Judgment for the plaintiff.

[\*294]

\*DE RIDDER against M'KNIGHT.

Whether a contract for a sale of chattels has been completed, is a question of fact for the jury, and the plaintiff ought not to be nonsuited on the ground that the contract was not fully made out. (a)

Where, on a sale of land, the vendee also agrees to purchase certain ponderous articles on the premises, and then enters into possession of the land, the articles sold still remaining upon it, this is a sufficient delivery.

IN ERROR to the Court of Common Pleas of the county of Washington.

The plaintiff in error, who was also plaintiff in the Court below, brought an action of assumpsit against the defendant to recover the price of a set of grist-mill stones. On the trial in the Court below, one *Barber* testified, that, on the sale of a farm by the plaintiff to the defendant, the defendant applied to the plaintiff for the purchase of a set of grist-mill stones, which it was understood did not pass with the land; that the plaintiff informed the defendant that he had bargained with one *Tiff* for the sale of the stones, but agreed, that, if *Tiff* would relinquish the bargain, the defendant should have them at the price agreed to be given by *Tiff*, which the witness understood to be about 70 dollars; that the defendant solicited the plaintiff to obtain *Tiff*'s relinquishment, and agreed to pay for that purpose, if demanded, a sum not exceeding five dollars. The witness stated, that he understood from the conversation, that, if the plaintiff procured *Tiff*'s relinquishment, the defendant was to take the stones according to the agreement.

*Powell*, another witness, testified as to a conversation between the parties at the time of executing the deed for the premises above mentioned, in which the plaintiff asked the defendant if he intended to take the mill stones; that the defendant answered he would rather not; but that it was then agreed that the plaintiff should procure *Tiff*'s relinquishment of the bargain, for which the defendant should pay, in addition to the price of the stones, which was declared to be 75 dollars; that the defendant agreed to accept a horse in payment, provided the horse suited him.

(a) Vide *Rafelye v. Mackie*, 6 Cowen, 250. *Outwater v. Dodge*, 7 Id. 86.



*Brewer*, another witness, testified, that, in the spring subsequent to the autumn in which the defendant purchased the plaintiff's farm, the defendant requested the witness to inquire of the plaintiff whether he had obtained *Tift's* relinquishment of the bargain; that the plaintiff informed him that he had obtained it, which the witness mentioned to the defendant, who expressed his satisfaction; that the defendant, afterwards, requested the \*witness to ask the plaintiff whether he was willing to receive payment in a horse. The witness also stated, that the mill stones had remained on the premises since the farm was purchased by the defendant, and were there still.

This evidence having been produced on the part of the plaintiff, the defendant's counsel moved for a nonsuit, on the ground that there was no bargain, in fact, made between the parties, and that if there were, it was void by the statute of frauds. The Court below thereupon directed the plaintiff to be nonsuited; and a bill of exceptions being tendered to the opinion of the Court, it was removed into this Court by writ of error.

*Wendell*, for the plaintiff in error, contended, that there was a sufficient delivery of the articles sold within the statute of frauds. (*Elmore v. Stone*, 1 Taunt. Rep. 458. *Bailey & Bogert v. Ogden*, 3 Johns. Rep. 399. *Rob. on Frauds*, 174—183.)

*Crary*, contra, insisted, that there was no contract of sale concluded between the parties; but if there were any contract, it was void by the statute, there being no memorandum, in writing, signed by the parties, nor any delivery by the vendor and acceptance by the vendee.† The statute applies as well to executory as executed contracts.‡

VAN NESS, J., delivered the opinion of the Court.

Whether the bargain between the parties for the sale of the mill stones was completed, or whether it was only *in fieri*, was a question of fact which ought to have been submitted to the jury for their decision. The evidence that the negotiation had been closed, and that the defendant had agreed to purchase, is pretty strong, and the jury would have been warranted to have found for the plaintiff. The greatest difficulty in the case is, whether it appears sufficiently that the plaintiff had procured a relinquishment from *Tift*, who had previously agreed to purchase the mill stones. From the testimony of *Brewer* it appears, that, at the defendant's request, he inquired of the plaintiff whether he had procured such relinquishment, who said he had; and that, when he informed the defendant of it, he "expressed his \*satisfaction with the same." The fact that the mill stones have remained continually in the plaintiff's possession, without any claim on the part of *Tift*, or any other person, affords a strong presumption that *Tift* had renounced any pretensions he might have had to them. The agreement between the plaintiff and *Tift*, in fact, presented no

NEW-YORK,  
May, 1816.

DE RIDDER  
v.  
M'KNIGHT.

[ \* 295 ]

† 3 Johns. Rep.  
399.

‡ *Bennet v.  
Hill*, 10 Johns.  
Rep. 365.

[ \* 296 ]

NEW-YORK,  
May, 1816.

ABEEL  
v.  
RADCLIFF.

legal obstacle to the sale to the defendant, because there is no evidence of any delivery to *Tift*, nor that he ever paid any part of the consideration money. Indeed, from the bill of exceptions, it is evident there was neither delivery nor payment. These remarks serve to show the propriety of submitting all the evidence to the jury, in order that they might have drawn the proper conclusions from it. If there was an absolute contract on the part of the plaintiff to sell, and on the part of the defendant to buy, the delivery was abundantly sufficient. The articles sold were ponderous, and there has been the only delivery of them which was practicable. They were left on the land purchased by the defendant, which was in his possession, and there they have since remained, in his power, and subject to be used by him whenever he pleased. The presumption, perhaps, is, that he has kept them in pursuance of the purchase made by him; for if he did not, why did he, shortly after the time he sent *Brewer* to the plaintiff to inquire about *Tift's* relinquishment of his purchase, request *Brewer* to ask the plaintiff whether he was willing to receive payment for the stones in a horse? The Court are, therefore, of opinion, that the judgment below ought to be reversed, and that a *venire de novo* be issued by the Court below.

Judgment below reversed

[ \*297 ]

\*ABEEL and ABEEL against W. RADCLIFF.

An action of assumpsit for the use and occupation of land, will lie against a lessee by deed who holds over after the expiration of the time.

And such action lies against a tenant, holding under a covenant contained in the expired lease, for a renewal.

A covenant in a lease, on the part of the lessor, to let the lot, at the expiration of the

term, to the lessee, without mentioning any price for which it was to be let, is not a covenant or a perpetual lease, or for a perpetual renewal of the lease, and can at best be extended to a single renewal for the term for which the original lease was given.

But it is not capable even of the latter construction, and is altogether void for uncertainty.

Every agreement which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, otherwise it cannot be carried into effect. (a)

(a) Vide S. C. 15 *Johns. Rep.* 505. *Little v. Martin*, 3 *Wendell's Rep.* 219. *Featherstonhaugh v. Radshaw*, 1 *Ibid.* 134. *Bancroft v. Wardwell*, *infra*, 489.

or let the said lot for a yearly rent to be fixed by three indifferent men, in like manner to be chosen by the said parties. It is, nevertheless, to be observed, that the said party of the second part shall not put on said lot any more buildings than a house and barn, which buildings only are to be appraised and paid for." The lessee took possession under this indenture, and the premises, after sundry mesne assignments, came into the possession of the defendant. The rent claimed by the plaintiffs was what had accrued since the assignment of the lease on the 10th of June, 1808. On the expiration of the term, the plaintiffs refused to have the buildings appraised, but offered a renewal of the lease for some short period of time; but the defendant insisted that he was entitled to a perpetual lease of the premises, and the plaintiffs offered to give a lease for a term not exceeding ten years, which the defendant refused. The parties thus differing as to their rights and liabilities, no rent was paid by the defendant. It was agreed by the parties that the rent of the premises for ten years, from the 1st of April, 1803, when the lease expired, ought to be estimated at twenty-five dollars per annum, and the rent on a perpetual lease at fifty dollars per annum. And, for the purpose of deciding all the rights and liabilities of the parties on the facts above stated, certain stipulations as to the mode of enforcing the decision of the Court were subjoined to the case, which it is unnecessary to state.

NEW-YORK,  
May, 1816.

ABEEL  
v.  
RADCLIFF.

[ \* 298 ]

*E. Williams*, for the defendant, contended, 1. That the defendant, and those under whom he claims, having entered and held the premises by virtue of a lease *under seal*, and the plaintiffs having refused to give a new lease according to the covenant, that is, a permanent lease, the present action, for use and occupation, could not be maintained; but the plaintiffs' remedy was on the contract.

2. That the plaintiffs, by their covenant of renewal, were bound to give a permanent lease, or one for the longest term known or recognized in the law. Such a lease is the only one that can afford reciprocity, and give effect to the contract. To show that this was the true construction of the covenant, he cited the following authorities, as establishing principles analogous: 3 *Atk.* 33. 475. 2 *P. Wms.* 196. 1 *Bro. P. C.* 522. 2 *Bro. Ch. Cas.* 636. 639. 3 *Bro. Ch. Cas.* 63. 4 *Bro. Ch. Cas.* 415. 2 *Vesey*, 498. 3 *Vesey, jun.* 295. 298. 378. 6 *Vesey, jun.* 232. *Cowp.* 819.

*Cantine*, contra, contended, that the original lease having expired, to support this action it was enough to show that the relation of landlord and tenant existed. The plaintiff could not sue on a lease which had expired, for rent accruing subsequent to its expiration. Here was an undertenant, against whom the plaintiff has a right to this action for the use and occupation.†

It is said here is a covenant, or agreement under seal; but this is merely an agreement to give a lease, not an actual lease,

† 8 *Term Rep.*  
327.

NEW-YORK,  
May, 1816.

ABERL  
v.  
RADCLIFF.  
† *Elliot v.*  
*Rogers, 4 Esp.*  
*N. P. Cases 59.*

and as no lease has been made out, or delivered pursuant to the agreement, the plaintiffs are entitled to this form of action.†

As to the main point, what lease the plaintiff was bound to give, that must depend on the construction of the covenant. If the intention of the parties is to be regarded, it is very evident, from the whole lease, that they never contemplated a renewal for a longer time than a year, or until the building could be appraised and paid for.

[ \* 299 ]

VAN NESS, J., delivered the opinion of the Court. The first question is, whether the plaintiffs can recover in this form of action. I think they can. The demise for the first ten years had expired before the defendant became the assignee; and the rent, for the recovery of which this suit is brought, is for the use and occupation of the premises since that period. There can be no doubt that *assumpsit* will lie against a tenant who holds over: in such cases the law creates a tenancy from year to year, and the tenant cannot be turned off without a previous notice to quit. (*Doe, ex dem. Rigge, v. Bell, 5 Term Rep. 471.*)

The defendant cannot be said to hold under the lease; the covenant for a new lease never having been executed upon the expiration of the ten years. After that period the defendant must be considered as holding under the covenant for a renewal: this case, then, is very analogous to that of *Elliot, executor of Thompson, v. Rogers, (4 Esp. Rep. 59.)* This was *assumpsit* for use and occupation: the plaintiff's testator had agreed, by deed, to give the defendant a lease, and it being objected that the action could not be maintained, Lord *Kenyon* held, that if there had been a demise by deed, the plaintiff could not maintain *assumpsit*; but that the agreement was not a lease, but only an agreement for a lease; that the defendant did not hold under the deed, and that the action was, therefore, maintainable. The covenant for a renewal of the lease, in this case, never having been executed, no action could be maintained upon it to recover the rent in question. This case is clearly distinguishable from that of *Smith v. Stewart, (6 Johns. Rep. 46.)* inasmuch as the defendant there entered under a contract to purchase the fee of the land, though I thought the action was maintainable even in that case.

It is submitted to us, also, to decide, for what term or estate the plaintiffs were bound to give a new lease, under the covenant stated in the original lease. The defendant contends, he is entitled to an estate in fee, rendering such rent as shall be fixed by appraisement. This pretension is altogether inadmissible. The object of the parties, probably, was to give the lessee a new lease for such a term as would reimburse or indemnify him for his expenses in the erection of a house and barn, in case the plaintiffs did not elect to pay for them at the expiration of the ten years. It is clear that an estate in fee was not contemplated by either of the parties. The words are, that the plaintiffs are

"to let the said lot," &c. The word *let* is strictly applicable \*to a lease, and not to a deed in fee; and a lease is for life or for years, or at will, and always for a less time than the interest of the lessor in the premises. In *England*, it is not unusual to insert a covenant in a lease, for a perpetual renewal, upon certain specified terms, but none of the cases upon this subject (several of which have been cited for the defendant) show this to be a covenant of that description. In all the cases cited, as well as some others, a perpetual renewal was agreed to be given, either by express words or necessary implication or construction, neither of which exist in the case before us. Construing the words of this covenant, *per se*, as we are bound to do, I think the plaintiffs, at most, would not be bound to give any other than a new lease for the same term as that for which the original lease was given, namely, for ten years. But I am of opinion, that this covenant is totally void for uncertainty. How far this uncertainty might be obviated by a bill in the Court of Chancery, to which the decision of this point properly appertains, I do not know; but proceeding upon the naked agreement, it is impossible to collect from it for what term the parties contemplated the new lease should be given. It is possible that it may be a good agreement for one year, but the words, that the land is to be "let for a yearly rent, to be fixed," &c., seem to imply that a longer term was contemplated. As I have before remarked, it probably was the intention of the parties to permit the lessee to occupy the land until he should be paid for the buildings erected by him; but the agreement is too loose and vague to justify giving even such an effect to it. Every agreement which is required to be in writing, by the statute of frauds, must be certain in itself, or capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect. The cases to this point are numerous and decisive, as will appear by a short reference to some of them. In *Blagden v. Bradlea*, (12 *Ves.* 466.) there was a bill for the specific performance of an agreement for the purchase of land, and the master of the rolls observed, that an auctioneer's receipt may be a note in writing, or memorandum, within the statute; but, then, the receipt must be certain within itself, or by reference to something else, so that it may be known what the agreement was. That one material particular did not appear in the receipt, \*namely, the *price*. The plaintiff must show a complete written agreement, and the bill was dismissed.

In *Clinan v. Cooke*, (1 *Scho. & Lef.* 22.) there was an agreement for a lease in which the *term* for which the lease was to be made was not mentioned, but the complainant (who filed the bill for a specific performance of the contract) was to pay a *yearly rent of two guineas for the first year, and 2l. 8s. for the remainder of the term*. The lord chancellor of Ireland held, that the agreement being silent as to the *term* to be demised, the

NEW-YORK,  
May, 1816.

ABEEL  
V.  
RADCLIFF.

[ \* 300 ]

[ \* 301 ]

NEW-YORK,  
May, 1816.

BEECKER  
V.  
VROOMAN.

defendant was not bound to perform the contract. This case, in its leading features, is very like the present, and appears to have been settled upon great deliberation. In *Seagood v. Meale & Leonard*, (*Prec. in Ch.* 560.) a like bill was filed on a written agreement which did not specify the terms, and the bill was dismissed. The same doctrine will be found in a great variety of other cases, as well at law as in equity; and the rule which I have mentioned appears to be settled upon the firmest basis. (*Boydell v. Drummond*, 11 *East*. 142. *Clark v. Wright*, 1 *Atk.* 12. *Bailey & Bogert v. Ogden and others*, 3 *Johns. Rep.* 399. *Towney v. Crowther*, 3 *Bro. C. C.* 318. *Symondson v. Tweed*, *Prec. in Chan.* 374. *Gill. Eq. Cas.* 35. *Bromley v. Jeffries*, 2 *Vern.* 415. *Underwood v. Hithcox*, 1 *Ves. jun.* 279.) In the case before us, the parties have omitted to state the term for which the new lease was to be given; and unless the Court makes a contract for them, the defendant is without a remedy, at least upon the case now presented to us. From what has been said, it follows that the plaintiffs are entitled to judgment, for ninety-five dollars and sixty-five cents. The stipulation in the case is, that twenty-five dollars, per year, shall be considered as a fair rent upon a lease for ten years; I presume, however, it was intended that the same rent should be allowed in case the Court should be of opinion that the plaintiffs were not bound to give a new lease.

Judgment for the plaintiffs, accordingly.

[ \* 302 ]

\*BEECKER & BEECKER against VROOMAN.

In an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or if the unsoundness produced merely a partial diminution of the value, he may show that part in mitigation of damages. (a)

IN ERROR to the Court of Common Pleas of the county of Madison.

This was an action of assumpsit brought by *Vrooman*, in the Court below, against the plaintiffs in error, to recover the price of a horse and a mare sold by *Vrooman* to the plaintiffs in error, who pleaded the general issue, with notice of special matter to be given in evidence. The plaintiff below having proved the sale of the mare to the defendants below, for the price of 35 dollars, the counsel for the defendants offered to prove, that, at the time of the sale, the mare was sick and diseased, and the plaintiff, well knowing this fact, represented her to be sound and healthy. This testimony was objected to by the plaintiff's counsel; and the defendants' counsel admitting, on being interrogated by the Court, that he was not prepared to prove that the defendants had entirely lost the mare, but offered to prove

(a) Vide *M'Allister v. Reab*, 4 *Wendell's Rep.* 483. *Barton v. Stewart*, 3 *Ibid.* 236. *Spalding v. Vandercook*, 2 *Ibid.* 431. *Dale v. Roosevelt*, 9 *Cow. Rep.* 307. *Hills v. Bamister*, 8 *Cow. Rep.* 31. *Sill v. Road*, 15 *Johns. Rep.* 230. *Fleming v. Slocum*, 18 *Johns. Rep.* 403.

that the mare was of very trifling value, and was sick and diseased, and that the plaintiff had defrauded the defendants in the bargain, the Court rejected the evidence, and ruled, that evidence of fraud was only admissible where it went to the entire cause of action, and could not be received in mitigation of damages, by showing a partial loss. The jury, under the direction of the Court, found a verdict for the plaintiff below for 39 dollars and 27 cents; and a bill of exceptions having been tendered by the defendants, it was removed into this Court by writ of error.

NEW-YORK,  
May, 1816.

GENERAL  
RULE.

The case was submitted to the Court without argument.

VAN NESS, J., delivered the opinion of the Court. The defence offered in the Court below was improperly excluded. The defendant below apprized the plaintiff of his intention to rely for his defence, at the trial, upon the fraud; and the established rule now appears to be, that, in cases like the present, fraud may be given in evidence as a defence, and will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true, as well as a salutary rule, and well calculated to do final and complete justice between the parties, most expeditiously and least expensively. (*Basten v. Butten*, 7 East, 490. n. *Lewis v. Casgrave*, 2 Taunt. 2. *Fisher v. Samunda and another*, 1 Camp. N. P. 190. *Runyan v. Nichols*, 11 Johns. Rep. 548.) The judgment must, therefore, be reversed, and a *venire de novo* issued in the Court below.

[ \* 303 ]

Judgment below reversed.

---

### GENERAL RULE.

*Supreme Court, May 10th, 1816.*

ORDERED, that, after the next *August* term, no cause be entered on the calendar of enumerated motions, unless a note of the issue be filed in the clerk's office of this Court, in the city where the Court is to be held, before the *Friday* next preceding the term.

END OF MAY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1816, IN THE FORTY-FIRST YEAR OF OUR  
INDEPENDENCE.

### WATTS against TAYLOR.

In an action of debt to recover the penalty given by the 14th section of "the act concerning distresses, rents, &c., the defendant may be held to bail

THE defendant was arrested and held to bail in an action of debt, brought to recover the penalty given by the 14th section of "the act concerning distresses, rents, &c." (sess. 36. ch. 63. 1 N. R. L. 434—437.) (a) which declares, that if any tenant, or lessee, shall remove and convey away, &c., his goods or chattels, from the demised premises, leaving the rent unpaid, &c., he shall forfeit and pay to the landlord or lessor, or his heirs or assigns, &c., double the value of the goods carried off or concealed, to be recovered in any action of debt, in any Court of record.

The recorder of the city of *New-York* having ordered the defendant to be discharged on filing common bail,

*Sedgwick*, for the plaintiff, now moved to vacate the order of the recorder, and that the defendant be held to bail. He cited 2 Term Rep. 154. 1 Hen. Bl. 10.

[ \* 306 ]

\**Goodenow*, contra, contended, that this was an action on a penal statute, in which, according to the settled rule of practice in the *English* Courts, the defendant could not be held to bail. He cited *Tidd's Pr.* 152. *Yelv.* 53. *Gilb. C. P.* 37.

*Per Curiam.* This is a motion to vacate the order of the recorder of *New-York*, for discharging the defendant on common bail. The action is founded on the 14th section of the statute "concerning distresses, rents, and removal of leases," (1 R. L.

(a) 2 R. S. 503.



437.) (a) for removing goods from the demised premises, leaving the rent unpaid. This is not a popular action. The penalty is given to the landlord or lessor, and is double the value of the goods carried off. The right of action vests in the party aggrieved, as soon as the grievance is committed. And GOULD, J., says, in the case of *Ward v. Snell*, (1 *Hen. Bl. Rep.* 13.) an action for such penalty is like an action on a bond to recover a debt already due, and the plaintiff, if he recovers in such case, is entitled to costs. The defendant was properly held to bail; and if there be any complaint with respect to the amount, the recorder, or a judge, at his chambers, can mitigate the bail.

ALBANY,  
August, 1816.

Ross  
v.  
DOLE.

Motion granted.

(a) 2 *R. S.* 503.

### Ross against DOLE.

THIS was a special action on the case, for erecting a nuisance, in which the plaintiff recovered forty-five dollars damages; and the question on the present motion was, whether the plaintiff could recover costs, or must pay costs.

Ross, for the plaintiff.

Buel, contra.

*\*Per Curiam.* This was a special action on the case for erecting a nuisance. The plaintiff has recovered 45 dollars, and the question now is, whether he is entitled to recover costs, or is bound to pay costs to the defendant. No certificate has been procured from the judge who tried the cause, that the title to land came in question. Nor, indeed, is it a case in which the title to lands could come in question. Although the defendant might have a claim to the house occupied by the plaintiff, he has no right to endeavor to drive him out, by erecting a nuisance. He must try his right in a regular course of judicial proceedings. And this we know he once attempted to establish, but failed. The offer of the defendant to show a title was properly overruled by the judge. The motion, on the part of the plaintiff, for costs, must be denied. He is bound to pay costs to the defendant, but the plaintiff has a right to set off the damages recovered against the costs, notwithstanding the lien which the defendant's attorney claims to have on these costs.

In a special action on the case for erecting a nuisance, the plaintiff having recovered forty-five dollars only, and there being no certificate of the judge, that the title to land came in ques-

[ \* 307 ]  
tion, it was held that the plaintiff could not recover costs, but must pay costs to the defendant. (d)

But the plaintiff was allowed to set off the damages recovered against the costs, notwithstanding any lien which the defendant's attorney claimed to have on the costs.

(a) Vide *Van Horne v. Petrie*, 2 *Caines's Rep.* 213. *Steele v. Western Lock Compa*  
*ny*, 2 *Johns. Rep.* 353. *Porter v. Lane*, 8 *Johns. Rep.* 357.

ALBANY,  
August, 1816.

WHITE  
v.  
SKINNER.

A person who seals a bond, as attorney for another, without authority, is personally liable, as if he had covenanted in his own name.

(a) Where the defendant to an action of covenant pleaded, that the plaintiffs, himself and

[ \* 308 ] others, were associated as copartners under a certain firm, and that he with B. and C. were appointed agents and directors for the company, and that he executed the agreement in his capacity of agent and director, and not otherwise, without averring or setting forth his authority, the plea, on demurrer, was held bad.

Where a person seals a deed, or executes a covenant, in behalf of others, he is bound to aver or set forth and prove the authority under which he acted. It is not enough to crave *oyer* of, and set forth, the instrument executed by him, in his plea. (b)

† 1 Chitty's Pl. 24. 3 Johns. Cas. 180. 2 Caines's Rep. 254. 2 Johns. Rep. 213. 7 Term Rep. 207.

### WHITE and others *against* SKINNER.

THIS was an action of covenant. The declaration set forth an agreement, under seal, dated the 25th of April, 1815, by which the plaintiffs covenanted to make and furnish, at the Granville cotton factory, a quantity of machinery, of a certain description, one half of which was to be delivered in October, 1815, and the other half on, or before, the 1st of May, 1816, and that the defendant, in and by the said agreement, covenanted to pay the plaintiffs for the said machinery 15,120 dollars, in various instalments; one of which, or 900 dollars, was to be paid on the 30th of May, another of 500 dollars on the 29th of June, and another of 500 dollars on the 29th of July, 1815; and breaches were assigned for the non-payment of these several instalments.

\*The defendant craved *oyer* of the contract, which was set forth *in hæc verba*, by which it appeared to be an agreement between the plaintiffs of the one part, and Reuben Skinner, (the defendant,) William Raymond, jun., and Abner Hitchcock, as directors of the Granville cotton manufactory, of the other part, and by which the persons named, of the second part, engaged, in behalf of the company, to pay to the plaintiffs the sums of money mentioned in the agreement; but the contract was signed and sealed by the defendant alone, in the following manner: "For the directors, Reuben Skinner, (L. S.)" The defendant then pleaded, 1. *Non est factum*: 2. A special plea in bar, that the plaintiffs, and several other persons, had previously associated themselves with the defendant, as copartners, under the firm of "The Granville Cotton Manufacturing Company," and had appointed the defendant president, and a director and agent, and William Raymond, jun., and Abner P. Hitchcock, directors and agents of the said company; and that the said agreement was executed by the defendant in his capacity of director and agent for the said company, and not otherwise, or in any other capacity whatever; of which the plaintiffs had notice, &c.

To this second plea there was a demurrer and joinder in demurrer.

Buel, in support of the demurrer, contended, that the defendant having signed the agreement with his own name merely, and affixed a seal, it was his own act and deed. It is not enough to exempt him from a personal liability, that he described himself in the deed as agent or attorney contracting in behalf of another.†

The defendant having craved *oyer*, and set forth the deed, it is part of his plea; and it appearing by the *oyer* that it was ex-

(a) Hills v. Bannister, 8 Cowen, 31.

(b) Vide Barker v. Mechanic Ins. Co. 3 Wendell's Rep. 94. Fox v. Drake, 8 Cow Rep. 191. Sinclair v. Jackson, Ibid. 543. Stone v. Wood, 7 Ibid. 453. Rossier v. Rossier, 8 Wendell's Rep. 494.

executed by the defendant himself, the plea is bad.† If an agent executes a deed for a principal, he ought to sign the name of the principal.‡

Again; a person who does an act in the name of another, without authority for the purpose, is personally responsible.§ Now, no authority is set out in the plea.

Cowen, and Skinner, contra, contended, that the defendant was not bound to set out the power under which he acted, in his plea. The plea alleges the fact, that he acted merely as agent,\*and the demurrer admits the fact. Certainty to a common interest is sufficient, and it was not necessary to state the manner in which the defendant was constituted an agent. A bailiff, or servant, may plead that he acted in that capacity. This is a proper plea in bar.|| If the defendant was agent for the whole firm, the plaintiffs are bound by his acts. They can never maintain any action against the defendant for this cause. In the case of *Hodgson v. Dexter*,¶ in the Supreme Court of the United States, the lease was signed and sealed by the defendant, in his own name merely, though in the body of the instrument he was described as secretary at war, and he covenanted for himself and his successors. The defendant there craved oyer, and pleaded in bar that he executed the lease in his official capacity, and, on demurrer, the plea was held good. In *Unwin v. Wolsey*,†† the Court of K. B. said it made no difference whether the contract were by deed or parol, where it appeared to have been made by the defendant as a public agent, and not on his private account.

In the present case, it appears from the oyer, that the defendant was agent merely, and the plaintiffs, knowing the fact, took it from him as acting in that capacity. On the face of it, then, the plaintiffs have no right of action against the defendant.

Again; if the defendant had no power to bind the *Granville Cotton Manufactory*, then the deed was void; then the plaintiffs should have brought an action on the case against the defendant for the fraud, or injury, and not have sued on the instrument, as if it were valid. If a person, acting as agent, exceeds his authority, he is liable, not on the contract, which he had no authority to make, but for the wrong he has done. The action is *ex delicto*, not *ex contractu*. But there can be no pretence of fraud in the defendant; and where there is good faith, the acts of an agent are to be favorably and liberally construed.‡‡

Again; it appears that the plaintiffs were partners with the defendant in the association. They cannot sue themselves; they must go into a Court of equity for redress, if they have sustained any injury.

Buel, in reply. The case of *Hodgson v. Dexter* was that of a government agent; and there is a clear and settled distinction between public and private agents.§§ The plaintiffs have not covenanted with the *Granville Cotton Manufactory*, but

ALBANY,  
August, 1816.

WHITE  
v.  
SKINNER.

† 1 Saund. 316,  
317. 1 Chitty's  
Pl. 420.

‡ 6 Term Rep.  
176. 9 Co. 76.  
b. 2 Lord Raym.  
1418. 1 Str. 705.  
2 East, 142.

[ \* 309 ]

§ 3 Johns. Cas.  
70. 180. 4 Mass.  
Rep. 595. 9  
Johns. Rep. 334.  
3 P. Wms. 279.  
1 Fonb. Equ.  
926. b. 4 Burr.  
2108.

¶ 1 Chitty's  
Pl. 434.  
¶ 1 Cranch's  
Rep. 345.

†† 1 Term  
Rep. 674.

‡‡ 1 Johns. Cas.  
110. 174. 2  
Caines, 310.

§§ 1 Chitty's  
Pl. 24. 1 Term  
Rep. 172. 676. 5  
East, 148.

ALBANY,  
August, 1816.

WHITE  
v.  
SKINNER.

† 1 *Bac. Ab.*  
*Authority, (A.)*  
*Co. Litt. 48.* †  
*Bulk. 96.*

† *Bogert v.*  
*Debussey,* 6  
*Johns. Rep. 94.*  
§ 1 *Str. 503.*  
1 *Saund. 291.*  
7 *Term Rep.*  
207. 2 *Caines's*  
*Rep. 254.* 2 *B.*  
& *P. 338.*

† 1 *Chitty's*  
*Pl. 460. 7 East,*  
*183. 3 East, 344.*

the \*defendant; and it was because they could not contract with that company that they entered into the covenant with the defendant.

If one of several partners executes a deed, or covenant, in the name of the firm, it is his own deed. It is not denied that the defendant was an agent of the *Granville Cotton Manufactory*. But there is a distinction between an attorney in fact, and an agent. The former can be constituted only by deed.† The authority of the latter may be by parol, or implied. An attorney must always use the name of his principal; an agent or factor may do the business in his own name. If the defendant had been an attorney in fact, and had executed the deed in his own name, it would have been void.‡ The deed is the act only of the person who affixes the seal, though other persons are named as the covenantors.§ But, where a person acts as an agent, contracts made by him are not void for want of authority, but he is personally liable. The plaintiffs, as partners, or the company, have no concern with this covenant. It is the individual act of the defendant. It is to be presumed, that he was indemnified for his undertaking.

Again; on what principle are the plaintiffs to be sent to a Court of chancery? They have an express covenant, on which they have adequate remedy at law. Matter of defence in equity cannot be set up at law.||

PLATT, J., delivered the opinion of the Court. The law is well settled, that one person cannot *seal* for another, without express authority, and it is also settled, that if a person execute a bond as attorney for another, *without authority*, such person so assuming to act is personally bound, as though he had covenanted in his own name simply. (7 *Term Rep.* 207. 3 *Johns. Cas.* 180. 2 *Caines's Rep.* 254. 5 *East*, 148.)

The case of *Tippets v. Walker and others*, (4 *Mass. Rep.* 595.) is similar to the present in almost every feature. There, a committee of a turnpike corporation covenanted in their own names, as a committee, to pay for making a road for the corporation, and the question was whether they were *personally liable*. Ch. J. *Parsons*, in delivering the opinion of the Court, says, "If any individuals, who are agents for the corporation, or of any officers of it, will voluntarily stipulate with workmen for their payment, it is reasonable that they should be holden to their contract. \*A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts made by its agents in its behalf, cannot, in a Court of law, be drawn in question."

Testing the defendant's plea by these rules, I think it is bad, and the demurrer is well founded.

The defendant represented himself, and assumed to act, as

the agent of the directors of the manufacturing company. He is now sued in his private individual capacity; and to exonerate himself, he was bound to aver and prove, that he had authority to seal for his co-directors.

The covenant is not to be regarded as a nullity. The plaintiff relied on this *specialty security*. If it does not bind the directors, for whom the defendant represented himself as agent, then it is personally obligatory on the defendant alone; and it is incumbent on the *defendant*, not on the *plaintiffs*, to aver and prove the authorization, if any, by which the defendant contracted for *Raymond* and *Hitchcock*, or for the company. Whether he had such authority is a fact for which the defendant alone is responsible; and he has no right to call on the plaintiffs to prove either the negative or affirmative. The plea is, therefore, bad, because it contains no such averment, upon which the plaintiffs might have taken issue. If the defendant is not personally bound, he ought, by his plea, to have shown, that upon this covenant the plaintiffs had a right of action against some other person.

That the plaintiffs were stockholders, or partners, in this manufacturing company, affords no ground to defeat their claim under this covenant.

The plaintiffs are entitled to judgment on the demurrer.

Judgment for the plaintiffs.

ALBANY,  
August, 1816.

PUTNAM  
v.  
PAYNE.

\*PUTNAM *against* PAYNE.

[\*312]

IN ERROR, on a certiorari to a justice's Court.

The defendant in error brought an action, in the Court below, against the plaintiff in error, for killing his dog. It was proved, at the trial, that the dog was very vicious, and frequently attacked persons passing in the streets, in *Lansingburgh*, where the parties resided. The plaintiff below had frequently been notified of the ferocious acts of his dog, and had been requested by the neighbors to kill or confine him. The dog in question had been bitten, a few days before he was killed, by a mad dog. There being a very great alarm in the village of *Lansingburgh*, on account of mad dogs, the inhabitants petitioned the trustees to pass by-laws for restraining dogs, and killing those that should be found at large; and the trustees accordingly passed a law, declaring it lawful for any person to kill any dog which should be found at large in the village. It was also proved that the plaintiff below called upon the defendant, and informed him, that a certain other dog in the village was mad, and requested him to go and shoot it; that the defendant accordingly took his gun for that purpose, and, in passing through the village,

Any person is justified in killing a ferocious and dangerous dog, which is permitted to run at large by its owner, or escapes through negligent keeping, the owner having notice of its vicious disposition. Any person is justified in killing a dog which has been bitten by another mad animal. (a)

But whether that could be a justification for killing more useful and less dangerous animals? *Quære.*

(a) Vide *Hinckley v. Emerson*, 4 Cow. Rep. 351.

ALBANY,  
August, 1816.

SWIFT  
v.  
HOPKINS.

met the plaintiff's dog running loose, and shot him dead. Judgment was given for the plaintiff below.

*Per Curiam.* It is unnecessary, in this case, to decide whether the act complained of could be justified under the by-law of the corporation.

The defendant was fully justified in killing the dog, under the circumstances of the case, upon common law principles. The dog was, generally, a dangerous and unruly animal, and his owner knew it; yet he permitted him to run at large, or kept him so negligently, that he escaped from his confinement. Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance. The public safety demands this rule. It is little better than mockery to say that a person injured by such an animal might sue for damages, or for penalties.

\* 313 ]

\*But, in addition to this, the dog had lately been bitten by a mad dog: this, in itself, was sufficient to justify any person in killing him, if found running at large. We do not mean to say that this would be allowed as a justification for killing more useful, and less dangerous, animals, as hogs, &c.

Judgment reversed.

### SWIFT against HOPKINS.

Where it does not appear that an agent, in making a contract, acted expressly, or ostensibly, as a public agent, it will be deemed a private contract. (a)

IN ERROR, on *certiorari* to a justice's Court.

*Hopkins*, the defendant in error, brought an action against *Swift*, the plaintiff in error, in the Court below, for services performed, money paid, &c.; and it was proved, at the trial, that the plaintiff below, being paymaster of a regiment of militia, in the town of *Paris*, and being at *Albany*, on the subject of pay due to the militia, was employed by the defendant to go to certain persons in *Madison* and *Oneida* counties, to procure certain certificates, relating to the payment of the militia, and to bring them to *Albany*, which was done by the plaintiff. It did not appear what was the defendant's office, or whether he had any, when he so employed the plaintiff; but after obtaining the certificates, he was at *Paris*, and there paid the militia. The defendant admitted that he had employed the plaintiff to do the service, which he had performed to his satisfaction; and on being asked by the plaintiff why he did not pay him, he replied, that he could not make it a charge against the government. Judgment was given for the plaintiff below, the defendant in error.

*Per Curiam.* Unless the contractor shows distinctly that, in making the contract, he expressly, or *ostensibly*, acted as a pub-

(a) Vide *Belknap v. Reinhart*, 2 *Wendell's Rep.* 375. *Fox v. Drake*, 8 *Cow. Rep.* 191. 12 *Johns. Rep.* 385. 444. 17 *Id.* 46. *Hodgson v. Dexter*, 1 *Cranch*, 345. 3 *Caines's Rep.* 69. *Olney v. Wickes*, 18 *Johns. Rep.* 122.

lic agent, it must be deemed a private contract. The return does not show that *Swift* assumed to act in an official capacity when he made this contract; and the reason assigned by him for refusing to pay, was, that he could not make a charge of it against the government, is decisive to show that it was a private contract.

ALBANY,  
August, 1816.  
VAN VALKEN-  
BURGH  
V.  
ELMENDORF.

Judgment affirmed.

\*VAN VALKENBURGH and another, Assignees of MAGEE, [\* 314]  
against ELMENDORF, Gent. one, &c.

THIS was a motion to set aside the report of referees appointed by a rule of Court, in an action of assumpsit brought by the plaintiffs, as assignees, under the insolvent act of *April*, 1811, of *Magee*, an insolvent debtor. At the hearing at *Catskill*, in the county of *Greene*, the plaintiffs gave in evidence the proceedings relating to the discharge of *Magee*, by which it appeared, that *J. Pinckney*, the commissioner under that act, for the county of *Greene*, had ordered an assignment of the insolvent's estate to the plaintiffs in conjunction with one *Henry M'Kinstry*; that an assignment was made to the three, but that the plaintiffs only had acted, *M'Kinstry* having refused to act. The defendant objected to the plaintiffs' claim, on the ground that, as the assignment was made to *M'Kinstry*, together with the plaintiffs, they could not maintain the suit in their own names alone. The objection, however, was overruled, and the referees reported in favor of the plaintiffs.

Where three assignees have been appointed under the insolvent act of the 3d *April*, 1811, (since repealed,) one of whom refuses to act, and no other is appointed in his stead, the two who enter upon the execution of the trust may maintain actions for debts due to the insolvent in their own names, without joining the third.

*Van Vechten*, for the defendant.

*Cantine*, contra.

*Per Curiam.* By the first section of the act "for the benefit of insolvent debtors and their creditors, passed 3d *April*, 1811, the commissioner is directed to order an assignment of the debtor's estate "to three discreet and sufficient persons," naming them. By the 4th section of that act, it is directed, that upon "producing a certificate under the hands and seals of the assignees, or any two of them," that the debtor has executed an assignment of all his estate, &c., then the commissioner shall discharge the debtor; and, by the 17th section of the same act, it is provided, "that a majority of the assignees in any case to be appointed, as in and by this act is directed, shall have power and authority to do all acts and perform all duties required of such assignees.

We incline to the opinion, that a true construction of that act is, that the commissioner shall appoint *three* persons as assignees; \*but that *any two* of them, by executing the certificate,

[\* 315]

ALBANY,  
August, 1816.

THORNE  
v.  
PECK.

and accepting the trust, are competent to perform all the duties. The law does not seem to require that there shall be three acting trustees. It is made the duty of the commissioner to make a new appointment as often as a vacancy occurs among the assignees; but in this case the vacancy occasioned by the refusal of *M'Kinstry* was not supplied by a new appointment, and the office of commissioner was abolished before this suit was instituted. So that if the *two assignees* cannot act, the trust must remain unexecuted. It accords with the *letter*, and, we think, with the *spirit*, of the statute, to uphold the acts of *two* of the assignees, where a *third* has been regularly appointed, and refuses to act.

The motion to set aside the report must be denied.

Motion denied.

### THORNE *against* PECK.

in an action  
against an a-  
gent for money  
alleged to be  
due to the plain-  
tiff, the defend-  
ant may give in  
evidence a pa-  
rol order from  
his principal not  
to pay the mo-  
ney.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, who was captain of a company of militia during actual service, in the year 1814, for his wages and rations as a drummer in the company. The defendant below acknowledged that he had received money for the pay and rations of his company; and the plaintiff below had served in the company for a considerable time, and then deserted, but within ten days returned again, when the defendant below refused to take notice of him, or to call his name at roll-call. The defendant below offered to prove that the paymaster-general gave him a verbal order not to pay any money to any man who had deserted, which evidence the justice refused to hear, on the ground that the order ought to have been in writing, and that a verbal order was insufficient. The defendant then produced a written order, directed to him from the colonel of his regiment, commanding him to pay over all the money in his hands for \*back rations, to the quarter-master of the regiment. Judgment was given for the plaintiff below.

[ \* 316 ]

*Per Curiam.* The verbal order of the paymaster-general was obligatory on Captain Thorne, who, for the purpose of paying the men, acted merely as the agent of the paymaster-general, and subject to his control. The justice erred in rejecting the evidence, and the judgment ought to be reversed.

Judgment reversed



JACKSON, *ex dem.* E. STEVENS, against F. STEVENS.

ALBANY,  
August, 1816.

JACKSON  
v.  
STEVENS.

Where a person, having no title to land conveys to another, and afterwards purchases a title to the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired, will enure to the benefit of his grantee and the confirmation of his title (a)

THIS was an action of ejectment for a lot of land in the town of *Dover*, in the county of *Dutchess*, which was tried before Mr. *J. Van Ness*, at the *Dutchess* circuit, in *August*, 1815.

Both parties ultimately derived their title from *Lewis Hunt*, who lived on the farm in question, until his death, in 1776 or 1777. *Hunt* left two daughters, his heirs at law; *Susannah*, who married *Elkanah Briggs*, and *Mary*, who married *Samuel Stevens*. *Stevens* died about four years before the trial, and, after his death, *Mary*, his widow, married *Justus Blanchard*. The following deeds were given in evidence at the trial:—

1. A deed, with warranty, dated the 24th of *December*, 1795, from *Elkanah Briggs*, and *Susan*, his wife, to *Samuel Stevens*, in fee, for the consideration of 930*l.* for an undivided half of the farm. This deed was not acknowledged by *Susan Briggs* until the 20th of *October*, 1815.

2. A deed, with warranty, from *Ebenezer Stevens*, the lessor of the plaintiff, and *Elizabeth*, his wife, to *Justus Blanchard*, in fee, dated the 15th of *July*, 1813, for the consideration of 2,800 dollars, for an undivided half of the farm. This deed, also, purported to convey "all the estate, right, title, interest, claim, or demand, which the said *Ebenezer Stevens* had to the premises, either in law or equity, from the last will and testament of *Samuel Stevens*, deceased." No will, however, was shown, nor any other evidence of title in the lessor of the plaintiff as derived from *Samuel Stevens*.

3. A deed, without warranty, from *Elkanah Briggs*, and *Susannah*, his wife, to *Ebenezer Stevens*, the lessor of the plaintiff, in fee, dated the 4th of *April*, 1814, and acknowledged the same day, for the consideration of 1,000 dollars for all the farm.

4. A deed, with warranty, from *Justus Blanchard*, and *Mary*, his wife, to *Thomas Stevens*, the defendant, in fee, dated, and duly acknowledged, on the 21st of *April*, 1815, for the consideration of 11,250 dollars, for the whole of the farm.

A verdict was taken for the plaintiff, subject to the opinion of the Court on the facts stated.

*P. Ruggles*, for the plaintiff, contended, that the conveyance from *E. Briggs*, and *Susannah*, his wife, to the lessor of the plaintiff, vested in him a legal right to an equal and undivided moiety of the premises in question; and that the possession of *Samuel Stevens*, or of those claiming under him, could not be adverse, as the deed from *Briggs* and his wife, of the 24th of *December*, 1795, though not acknowledged by her, vested in *S. Stevens* a particular estate in the premises during their joint lives.†

Again; the lessor of the plaintiff is not estopped, by his deed,

(a) Vide *Oakley v. Stanley*, 5 *Wendell's Rep.* 523. *Overseers of Bridgewater v. Overseers of Brookfield*, 3 *Conn. Rep.* 299. *Wilson v. Troup*, *Ibid.* 193.

† *Jackson v. Sears*, 10 *Johns. Rep.* 435. *Jackson v. Schoonmaker*, 4 *Johns. Rep.* 390.

[ \* 317 ]

ALBANY,  
August, 1816.

JACKSON  
v.

STEVENS.

† 12 Johns.  
Rep. 201.; and  
see Jackson v.  
Hull, 1 Johns.  
Cas. 90.

of an undivided moiety of the premises to *Blanchard*, from claiming the other undivided moiety, by an after purchase, against him, or those claiming under him. The case of *Jackson*, ex dem. *Danforth*, v. *Murray*,† does not proceed on the ground of an *estoppel*. The principle there decided is, that a person shall not be permitted to claim in opposition to his own deed, by alleging that he had no estate in the premises at the time of giving the deed.

An *estoppel* is where a person is concluded by his own act, or acceptance, to say the truth. An *estoppel* is reciprocal, and binds both parties, and it ought to be certain to every intent; and, therefore, if a thing is not directly and precisely alleged, it will be no *estoppel*. So, if an interest passes from the party, there shall be no *estoppel*. A party shall not be estopped to aver a thing consistent with the record or deed. A man cannot be estopped by accepting a deed of his own land.‡

‡ Com. Dig.  
Esto pel, (A.)

[\* 318]  
1.) (B.) (E. 3.)  
(E. 4.) (E. 8.)  
Co. Litt. 352.  
a. 352. b. 4. Bac.  
Abr. 189. Leases  
for years,  
(O.) 1 Roll.  
Abr. 877. pl. 3.  
Co. Litt. 45. a.

§ 10 Johns.  
Rep. 292. 358.

¶ Jackson v.  
Bradt,  
Caines's Rep.  
174, 175, 176.

\*The plaintiff, by his deed to *Blanchard*, can be concluded only as to that moiety. It would be carrying the doctrine of *estoppel* very far to say, that a person who has conveyed one moiety of an estate, should be estopped as to the other moiety subsequently acquired by him. The party is not estopped beyond the estate he held.§ The grantee must resort to the covenants of warranty, if the grantor has no title. Tenants in common, in all actions, real and mixed, must sever, because their estates are several, and they claim by several titles. There is no unity but that of possession.|| If the plaintiff should now be estopped from recovering the moiety subsequently purchased, his first deed would operate to convey the whole estate instead of a moiety.

*J. Tallmadge*, contra, contended, 1. That there was an ad-

¶ Jackson v.  
Sears, 10 Johns.  
Rep. 435.

verse possession for 20 years.¶

2. That the lessor of the plaintiff was estopped by his deed to *Blanchard*. A man is never allowed to claim in opposition to his own deed, or to say he had no title. An after-acquired title is good, by relation, and establishes and makes good all intermediate conveyances.†† And in *Jackson*, ex dem. *Benson*, v. *Matsdorf*,†† the chief justice lays it down, that a deed, with warranty, is sufficient to pass any title subsequently acquired by the grantor. §§

†† Jackson v.  
Bull, 1 Johns.  
Cas. 90. 12  
Johns. Rep. 201.

†† 11 Johns.  
Rep. 91.

§§ Co. Litt.  
265. a. Vin.  
Abr. Estoppel,  
(2.) pl. 9. (A.  
a.) pl. 6. (B. a.)  
pl. 8. pl. 15. Co.  
Litt. 47. b. 1  
Salk. 276. 2  
Lord Raym.  
1561.

3. By the 5th section of the act concerning uses, (sess. 10. ch. 37.) it is declared, that every estate, feoffment, gift, release, grant, &c., by persons of full age, &c., are good and effectual against the seller, feoffor, donor, or grantor, and their heirs, and all persons claiming under them. The statute of uses comes in the place of livery of seisin; there was a transmutation of the possession by the deed of *Briggs* and his wife to *E. Stevens*. The deed was effectual to pass an estate in fee; and if not, the subsequent acknowledgment is a confirmation, by relation, so as to make good all intermediate acts of the grantee.

4. *Briggs* and his wife were concluded by their deed from conveying to the lessor of the plaintiff. *Samuel Stevens* held adversely, and any subsequent conveyance by Mrs. *Briggs* would be void. The grantor must have power to deliver the possession, and actually deliver it.†

5. Again; the deed of *Briggs* and wife was a discontinuance \*of the estate, and she must have entered before she could have power to convey. The statute‡ which declares, that no acts of the husband shall prejudice the wife or heirs, saves only her right of entry, according to her right or title, as if no such act of the husband had been done or suffered. A conveyance by the husband, with warranty, works a discontinuance of the wife's estate, and she must enter before she can convey.§

*Oakley*, in reply, insisted that the possession of *Samuel Stevens* was not adverse, because he must have taken possession according to his title. His possession was that of Mrs. *Briggs*, and so continued throughout.

Mrs. *Briggs* was estopped, by her deed of the 4th of April, 1814, duly acknowledged, to set up the prior deed of the 24th of December, 1795, and her subsequent acknowledgment of that deed, in October, 1815, cannot make it good by relation. In *Jackson v. Halloway*,|| it was decided that the wife, having joined her husband in executing a lease in 1806, duly acknowledged by her, had put it out of her power to affirm a prior lease by her husband, in 1795.

As to adverse possession, it must have been so from the beginning, otherwise it cannot avail.

The wife could not join in any warranty, or make a personal covenant, and a deed, with a warranty by the husband, cannot affect her rights, or work a discontinuance of her estate. There can be no discontinuance, unless it creates an adverse possession, so as to render an actual entry necessary, which was clearly not the case here. When the statute says the wife may enter, it means that her right of entry is saved, and she may enforce it by an action of ejectment. The notion of an actual entry by her is obsolete.

As to the principal point raised in the cause, whether the deed to *Blanchard* is an estoppel, we contend that the cases cited do not rest on the strict doctrine of estoppels. The principle is, that a party having no interest at the time of his conveyance, but acquiring a title afterwards, shall not be allowed to say he had no title when he first conveyed. It does not appear how the title was vested in *Samuel Stevens*.

The deed from *E. Stevens* to *J. Blanchard* purports to be a conveyance of all the estate acquired under the will of *Samuel Stevens*. When *Blanchard* professes to take such an interest, \*can he ever allege that the estate was acquired in a different manner?

ALBANY,  
August, 1816.

JACKSON  
v.  
STEVENS.  
† 9 Johns  
Rep. 57.  
[ \* 319 ]  
‡ 1 N. R. L.  
162. secs. 24.  
ch. 169. s. 2.

§ Co. Litt.  
326. a. 330. n.  
284. 2 Bac. Abr.  
Discontinuance,  
(G.) 2 Roll.  
Rep. 31. Cro.  
Cur. 320. Vin.  
Abr. Baron and  
Feme, (E. a.)  
(pl. 9.)

|| 7 Johns.  
Rep. 81.

[ \* 320 ]

ALBANY,  
August, 1816.

PRATT  
v.  
MALCOLM.

21st of *April*, 1814, unquestionably conveyed to the plaintiff a good title for an undivided half of the farm, *Mary* never having executed any other deed. The question is, whether the plaintiff shows a title to the other half.

It appears that the lessor of the plaintiff, in 1813, having no title from any source, executed a deed with warranty to *Justus Blanchard*, for an undivided moiety of the farm, and also all his interest under the will of *Samuel Stevens*, for the consideration of 2,800 dollars; and that, on the 4th of *April*, 1814, about nine months afterwards, he obtained, for the consideration of 1,000 dollars, a conveyance, without warranty, of the whole farm from *Briggs* and his wife.

There appears to be nothing to hinder the application of the rule of estoppel. *Ebenezer Stevens* professedly conveyed an undivided half of the farm, and all his other interest under the will, without showing what it was, to *Blanchard*, who conveyed to the defendant. Now, in the absence of all other proof, it must be intended that the subsequent purchase made by *Ebenezer Stevens*, from *Briggs* and his wife, was designed to confirm the deed which he had before executed to *Blanchard*.

Judgment for defendant.

### PRATT against MALCOLM.

A bill of exceptions signed by two justices only of the Court of Common Pleas, is not such a bill of exceptions as this Court will judicially take notice of, or [ \* 321 ]

grant a writ to require the justices to come in and confess or deny their seals. (b)

*STORRS*, for the plaintiff in error, moved, that the judges of the Court of Common Pleas of *Madison* county, who had signed the bill of exceptions taken in this cause, come in and acknowledge their seals, and that a writ be directed to them for that purpose. (1 N. R. L. 326. sess. 36. ch. 4. s. 6.) (a)

*Foot*, contra, objected that only two of the justices had signed the bill of exceptions; whereas three justices, at least, were \*necessary to constitute a Court of common pleas, so that this was not a legal bill of exceptions, or one of which this Court could take notice.

*Storrs*, in reply, contended, that if one of the justices refused to sign the bill of exceptions, the others might do it; that this was so laid down by *Coke* in his reading on the English statute, which was similar to ours; (2 Inst. 427. 2 Lev. 237.) and in the case of *Maney and others v. Leach*,† *Pratt*, the chief justice of the C. P., alone sealed the bill of exceptions, and came into the Court of K. B. to acknowledge his seal, pursuant to the writ directed to him for that purpose.

*Per Curiam*. The application, in this case, is for a writ directed to the judges of the Court of Common Pleas of *Madison*

(a) 2 R. S. 422, 423.

(b) Vide *Shipherd v. White*, 3 Conn. Rep. 33. Note (a) and the cases there cited. *Clark v. Dutcher*, 19 Johns. Rep. 246.

† *Burr*. 1692. 1742. 1750.

county, requiring them to come into this Court to confess or deny their seals to a bill of exceptions. Upon examining the bill of exceptions, it purports to have been sealed by only two judges. This we think is not sufficient. Not less than three judges can form a Court of common pleas. And as the bill of exceptions is not a part of the record, the decision complained of should at least appear to be made by a number which we can judicially notice as constituting a Court. To permit a bill of exceptions to be sealed by one judge only, would be liable to great abuse; for although, regularly, a bill of exceptions must be tendered at the trial, yet it is, in practice, usually reduced to form, and sealed afterwards, and often in vacation. We think, therefore, that this is not such a bill of exceptions, as we can notice, so as to justify the granting of the motion.

ALBANY  
August, 1816.

DENSTON  
v.  
HENDERSON

Motion denied.

\*SCIDMORE *against* SMITH.

[ \* 322 ]

IN ERROR, on a *certiorari* to a justice's Court.

*Smith*, the defendant in error, brought an action of *trespass* (as was stated in the return) in the Court below, against the plaintiff in error, to recover damages for seducing and harboring his man servant. It was objected that the action should have been *debt*, under the 15th section of the "act concerning slaves and servants," (2 N. R. L. 206.) (a) but the exception was overruled, and judgment was given for the defendant in error.

An action on the case lies for seducing and harboring the servant or slave of the plaintiff, notwithstanding the penalty given by the "act concerning slaves and servants," (2 N. R. L. 206.) which is a cumulative remedy. (b)

*Per Curiam*. The statute penalty, for harboring slaves or servants, is cumulative, and does not destroy the common law remedy.

Judgment affirmed.

(a) 2 R. S. 158.

(b) *Almy v. Harris*, 5 Johns. Rep. 175. *Farmer's Turnpike Company v. Coventry*, 10 Johns. Rep. 389.

DENSTON *against* HENDERSON and CAIRNS.

THIS was an action of *assumpsit*, brought by the plaintiff against the defendants, as endorsers of a bill of exchange for

A bill of exchange was drawn in the United States,

upon A., of London, on which the defendants were endorsers; before the bill became due, B., the agent of the defendants, offered C., the holder of the bill, to pay it, in case A. did not, for the honor of the defendants; and C. promised to let him have the bill for that purpose; the bill not having been paid by A., B., being informed of the circumstance, requested C. to let him have the bill, and that he would pay it; this C. declined, and said that the bill had been put into the post-office to be returned to America; it was held that B. ought to have been ready, in London, to take up the bill when it became due; that his offer to pay, when the rights of the parties had become fixed, was of no avail; that the previous promise of C. to let him have the bill, in order to pay it, was *nudum pactum*, and that, under the circumstances of the case, the plaintiff was not precluded from recovering 20 per cent. damages on the amount of the bill.

The plaintiff, in action on a foreign bill of exchange, is entitled to recover the amount of the bill according to the rate of exchange at the time of notice of its dishonor to the defendant, with 20 per cent. damages, calculated on the nominal amount of the bill, and with interest on those two sums from the time of notice. (c)

(c) Vide *The Bank of Shengango v. Osgood*, 4 Wendell's Rep. 607. *Hendricks v. Franklin*, 4 Johns. Rep. 119. *Scotfield v. Day*, 20 Johns. Rep. 102.

ALBANY,  
August, 1816.

DENSTON  
v.  
HENDERSON.

[ \* 3:3 ]

750*l.* sterling, drawn by *Robert Patton, jun.*, of *Alexandria*, on *Inglis, Ellice & Co.*, of *London*, in favor of *Robert Patton*, dated the 28th of *July*, 1812, and which had been duly protested for non-payment, and notice thereof given. The cause was \*tried before *Mr. J. Spencer*, at the *New-York* sittings, in *November*, 1815.

The defendant read, at the trial, the deposition of *Edward Frears*, of *Birmingham*, taken under a commission, who stated that he and his partner, *Edward Cairns, jun.*, were the correspondents and agents of the defendants, and that they had directions from the defendants to pay all bills of which they were the drawers or endorsers, which were not duly honored by the drawers, and particularly bills of exchange drawn on *Inglis, Ellice & Co.*, of *London*; and that, in consequence of such orders, they had paid several bills of exchange for the honor of the defendants. The deponent, understanding, on or about the 10th of *November*, 1812, that a bill drawn on *Inglis, Ellice & Co.*, on which the defendants were endorsers, had been refused acceptance, applied, several times, to *Wm. Wallis*, the holder of the bill, to inquire whether the bill had been accepted, and, at those times, informed *Wallis* that if the bill was not paid, the deponent and his partner would pay it, and requested him to let them have the bill, in case of its not being paid by the drawers, which he promised to do. The deponent, understanding that the bill would become due about the 22d of *December*, 1812, wrote to *Inglis, Ellice & Co.*, requesting to be informed when the bill would become due, and stating that the deponent and his partner had directions to pay bills for the honor of the defendants; to which letter no answer was returned until the 23d of that month, when a letter was received from *Inglis, Ellice & Co.*, informing him that the bill had been presented for payment, and refused. Immediately on receiving this letter, the deponent called on *Wallis*, taking with him a check upon his bankers to pay the bill and expenses, and told him that if he would let him have the bill, he would pay it; *Wallis* then said to him, "Do not you think the damages would be as good in my pocket as theirs?" (meaning the defendants.) The deponent said, "But you know, *Mr. Wallis*, I told you we had instructions to prevent this;" to which *Wallis* said, "I am satisfied with the endorsers," or words to that effect, and informed the deponent that he had put the bill into the post-office, to be sent to *America*. The deponent stated, that after a letter had been put into the post-office, the post-master would not return it to any person. The defendants had, at the time, funds, in the hands of the deponent and his partner, with which the bill \*might have been paid; and they were prevented from paying the bill in *London*, as they might have done, by not hearing from *Inglis, Ellice & Co.* in time.

[ \* 324 ]

The plaintiff proved, that, at the time the bill of exchange was returned, the rate of exchange between *England* and *Amer-*  
268

ica, was 16 per cent. below par, and that, at the time of the trial, it was 8 per cent. above par, and the counsel for the plaintiff insisted that the plaintiff was entitled to recover the amount of the bill, at the rate of exchange at the time of the trial. The judge, however, expressed his opinion that the plaintiff was entitled to recover the amount of the bill, at the rate of exchange when the same was returned, with damages, and no more. A verdict was then taken for the plaintiff, for the amount of the bill, deducting 16 per cent., with 20 per cent. damages, calculated upon the face of it, and interest on both those sums, from the time that the bill was returned, subject to the opinion of the Court on a case made, with liberty for the Court to increase the verdict, or, if the plaintiff were not entitled to damages, to diminish it.

ALBANY,  
August, 1816.  
WARDELL  
v.  
FOSDICK.

*D. B. Ogden*, for the plaintiffs. He cited *Dash v. Graves*, 12 Johns. Rep. 17. in error.

*Colden*, and *Hoffman*, contra. They cited *Thompson v. Robertson & Bowne*, 4 Johns. Rep. 27. *Durkin & Henderson v. Cranston*, 7 Johns. Rep. 442.

*Per Curiam*. The facts stated afford no ground of defence in this action. *Wallis* pursued the strictly-regular course to charge the endorsers. If the agents meant to carry into effect the agreement with *Wallis*, they should have stood ready to pay and take up the bill in *London*, when it was payable. They never tendered payment in *London*, nor did they do so at *Birmingham*, until the rights of the parties were fixed. Indeed the agreement with *Wallis* was *nudum pactum*; the agents were not compellable to pay at any time. When *Wallis* committed the dishonored bill to the post-office, it was uncertain whether the agents would, or would not, choose to pay it; and when they offered to pay, it was upon a condition which it was impossible for him to comply with—the delivery of the bill. The jury gave the value of the bill at the rate of exchange at the time of notice to the endorsers, with 20 per cent. damages, on the nominal amount of the bill, and interest on both sums from the same time: this was right.

[ \* 325 ]

Judgment for the plaintiff, according to the verdict.

### WARDELL against FOSDICK and DAVIS.

THIS was an action of trespass on the case for a deceit in selling to the plaintiff, for a valuable consideration, land which had no existence. The cause was tried before Mr. J. Spencer, at the New-York sittings, in November, 1815.

An action on the case for a deceit lies for fraudulently selling land which has no real existence,

notwithstanding any covenants in the deed, which the plaintiff may treat as a nullity. (a)

(a) Vide *Leonard v. Pitney*, 5 Wendell's Rep. 30. *Benton v. Pratt*, 2 Ibid. 385. *Monell v. Colden*, *infra*, 399.

ALBANY,  
August, 1816.

WARDELL  
v.  
FOSDICK.

The following are the material facts in the case:—

*William S. Corlies*, of the city of *New-York*, and *Mary*, his wife, by indenture dated the first of *January*, 1809, conveyed to the defendants, in consideration of the sum of five hundred and fifty dollars, a certain tract of land described as lying in the township of *Moab*, in the county of *Luzerne*, and state of *Pennsylvania*, containing 450 acres, in lot No. 14, in the said township. The deed contained covenants of seisin, quiet enjoyment and warranty. Some time after the execution of the deed, *Fosdick*, one of the defendants, called on *Corlies*, and told him that he had been in the state of *Pennsylvania*, and had examined the records there, and could find no such town or land as were described in the deed, and said that *Corlies* had broken the covenants in the deed, and threatened to prosecute him. Some time after this, *Corlies* received a note from Mr. *Bostwick*, who then acted for the defendants as their attorney, informing him that he had been instructed by the defendants to bring a suit against him for the consideration money mentioned in the deed. *Corlies* again called upon *Bostwick*, in consequence of another note, who said that he must sue him, but offered, that if he would give a note for 125 dollars, with a good endorser, he would give up the deed; but this *Corlies* said he was not able to do. *Corlies*, some time afterwards, met *Davis*, the other defendant, who told him that he had sold the land; and *Corlies* never heard any thing more from the defendants on the subject. After the conversation above mentioned between *Fosdick* and *Corlies*, the \*defendants conveyed to the plaintiff, by deed dated the 25th *April*, 1811, for the consideration of 450 dollars, the tract of land lying in the township of *Moab*, being the same as was conveyed to them by *Corlies*, and covenanted only that they had done no acts to impeach the title. The defendants, on the same day, executed an assignment to the plaintiff of the deed from *Corlies* to them. A verdict was found for the plaintiff, subject to the opinion of the Court.

[ \* 326 ]

*Edwards*, for the plaintiff, contended, 1. That the defendants, having themselves examined and ascertained the fact that there was no such land in existence as they offered to sell to the plaintiff, were bound to disclose that fact to him, and the suppression of it was a fraud and *deceit*, for which this action properly lies.† The covenants in the deed were broken as soon as they were made.‡

2d. That, if any objection could have been made to the action, it cannot now be made, as the proof fully supported the third count in the declaration, and the defendants can only avail themselves of the objection on a motion in arrest of judgment, or by writ of error.

*Baldwin*, contra. The cases cited are those of sales of personal property, where there is an implied warranty as to title. They do not apply to a sale of real estate, where the purchaser

† 1 Roll. Abr.  
90. 9 Hen. VI.  
53. b. Cro. Eliz.  
44. 1 Fonb.  
Eq. 366. 1  
Ves. 96. Nels.  
Chan. Rep.  
118. Seixas v.  
Wood, 2  
Caines's Rep.  
58. Spencer, J.  
Nixon v. Bel-  
throp, 2 Johns.  
573.

§ 1. 4  
§ 2. 4  
§ 3. 4  
§ 4. 4  
§ 5. 4  
§ 6. 4  
§ 7. 4  
§ 8. 4  
§ 9. 4  
§ 10. 4  
§ 11. 4  
§ 12. 4  
§ 13. 4  
§ 14. 4  
§ 15. 4  
§ 16. 4  
§ 17. 4  
§ 18. 4  
§ 19. 4  
§ 20. 4  
§ 21. 4  
§ 22. 4  
§ 23. 4  
§ 24. 4  
§ 25. 4  
§ 26. 4  
§ 27. 4  
§ 28. 4  
§ 29. 4  
§ 30. 4



must rely on his covenants as to the title. The cases decided in chancery are those in which a party applies for the specific performance of an agreement of sale, and the Court will not help him if he has not acted fairly. To support this action, there must have been an industrious concealment, by the vendor, of a fact unknown to the purchaser, or the defect must be latent. If the defect were *patent*, or could have been discovered by a vigilant man, equity will not help the purchaser.† The rule in regard to the sale of land, is *caveat emptor*. The fact, whether there was any such land in existence, or not, must be regarded as *patent*; for, by a reference to the records of the state of *Pennsylvania*, it might have been easily ascertained whether there was any such place or land as that described. Again; how can *Davis*, the other defendant, be charged with fraud? The evidence of concealment, or of false affirmation, applies only, if at all, to *Fosdick*.

ALBANY,  
August, 1816  
WARDELL  
v.  
FOSDICK

† *Sugd. Law*  
of V. 2. 195. 2  
Ld. Raym.  
1118, 1119. 1  
Salk. 210. 3  
Term Rep. 51.  
56.

\**Slosson*, in reply, insisted, that the action was sustainable. The principle laid down in the books is, that if a vendor practises deceit, or conceals a fact, which goes to the essence of the contract, an action lies. The cases which support this doctrine are numerous, and relate to the sale of lands.‡ In *Lynsey v. Selby*,§ the Court put their decision on the ground of a concealment by the vendor of a matter of fact. Here the defendants had previously examined and ascertained the fact of the non-existence of the land, or township, and, to avoid responsibility, they referred to *Corlies*, and exhibited *Corlies'* deed with full covenants and warranty.

[ \* 327 ]

"Silence," in this case, as is said by *Roberts*, "was treacherously expressive."¶ The non-existence of the township, or land, is not a *patent* defect. Though the plaintiff might be bound to know the towns of this state, which are of record, yet he is not under the same obligation in regard to towns in other states.

† *Sugd. L. of*  
V. 1—6. 1 *Lev.*  
102. 2 *Caines's*  
*Rep.* 103. 4  
*Johns. Rep.* 12.  
*Co. Litt.* 384. a.  
n. 332. *ad finem.*  
1 *Com. Dig.*  
230. *Action on*  
*the Case for a*  
*Deceit, (A. 8.)*  
1 *Sid.* 146.

§ *Ld. Raym.*  
1112.

¶ *Rob. on*  
*Frauds*, 130. 2  
*Johns. Rep.* 369.

Can the assignment of the covenants in *Corlies'* deed destroy the plaintiff's right of action for the deceit? The assignment is tantamount to the defendants' own covenants; and it is settled, that the action for a *deceit* is collateral to the action on the covenants in the deed of the vendor. This action is for the damages caused by the deceit; the covenants are for the security of the title. The covenants were broken when they were assigned. The assignment was a mere *chose in action*, or a lawsuit. If a covenant is to be a bar to this action, it must be a perfect substitute. The case of *Lynsey v. Selby* shows, that this action lies, notwithstanding the covenant, in the deed of the vendor. And in *Pitcher v. Livingston*, VAN NESS, J., seems to take it for granted, that the action lies in such case. The action for a *deceit* is a distinct and substantive cause of action. One covenant cannot be pleaded in bar of an action on another covenant, for the damages recovered may be different.¶

¶ 2 *Vent.* 217.  
*Bennet v. Irwin*,  
3 *Johns. Rep.*  
363.

ALBANY,  
August, 1816.

HANCOCK  
v.  
STURGES.

was known to the attorney of the plaintiffs when the suit was commenced. The cause had been tried, and a verdict found for the defendant.

*Parker, contra.*

*Per Curiam.* This motion must be denied. The defendant comes too late, after verdict, to ask for security for costs. Had the application been made before trial, the Court would have ordered the proceedings stayed until security for costs was filed.

But we can find no practice to warrant us in directing it to be done in this stage of the cause, *nunc pro tunc*.

Motion denied.

[ \*331 ]

\*HANCOCK against STURGES.

The act for the inspection of flour, &c. (sess. 36. c. 27. 2 N. R. L. 320.) does not apply to flour purchased out of this state, to be consumed in another state, (where it has been inspected and branded,) and brought to New-York, and there shipped, with a view to be forwarded to its place of destination.

THIS was an action of *assumpsit*, for money had and received to the use of the plaintiff, and was tried at the New-York sittings, in October last, before Mr. Justice Platt, when a verdict was taken for the plaintiff, subject to the opinion of the Court, on the following case:—

In the autumn of the year 1813, while the *British* cruisers were hovering on our coast, and occupying *Long-Island* sound, the plaintiff, a citizen of *Hartford*, in the state of *Connecticut*, purchased at *Baltimore*, in *Maryland*, 59 barrels of flour, which was duly inspected at *Baltimore*, and branded “Superfine,” and which was brought by land to the city of *New-York*, with the intent of carrying the same to *Hartford*, where the same was intended for consumption. When the flour arrived at *New-York*, the agents of the plaintiff, thinking there was less risk in navigating the sound than there had been some time before, determined to send the flour by water to *New-Haven*, to be forwarded from thence to *Hartford*; and, with that view, the flour was put on board of a sloop, without having been inspected in *New-York*. The defendant, being an inspector of flour, though informed of the circumstances and the intention of the plaintiff, seized the flour, as forfeited under the inspection laws of this state, and sold it at auction for 427 dollars and 75 cents, which, with the interest, amounted to the sum given by the verdict.

The case was submitted to the Court without argument.

*Per Curiam.* The circumstances under which the flour in question was put on board the sloop for transportation, did not make it necessary to have it inspected. The leading object of the statute (2 N. R. L. 320.) (a) is to preserve the character of flour manufactured in this state, or purchased here for exportation. The provisions in the statute accordingly embrace the two cases of flour manufactured here for exportation, and that purchased here for exportation; neither of which reaches the

(a) 1 R. S. 536.

present case. The 8th section of the act under which the seizure in question must have been made, must be construed with reference to the general object and other provisions in the statute. It declares, \*that if any person shall lade, or attempt to lade, on board any vessel, with intent to ship or export the same *direct* out of this state, any flour not branded as aforesaid, he shall forfeit the same. This was not a direct shipment or exportation out of this state. The flour was merely *in transitu*, from *Baltimore* to *Hartford*, and did not come within the mischief intended to be guarded against by this statute, any more than if the transportation had been by land through this state. This flour had been inspected in *Baltimore*, and there branded. Our statute requires that flour manufactured for exportation, shall be packed in casks of certain specified dimensions, and be branded with the initials of the Christian and surname of the manufacturer and quality of the flour, before the same shall be offered for inspection; and unless the cask is made and branded, and the flour packed as required by the act, the inspector is not authorized to give it his brand. Indeed, the act, throughout, shows that its provisions could not have been intended to apply to flour situated like that now in question. The plaintiff must, accordingly, have judgment upon this verdict as found by the jury.

Judgment for the plaintiff.

### GUY against OAKLEY.

THIS was an action of assumpsit, brought to recover the price of thirty-three kegs of tobacco belonging to the plaintiff, and consigned to the defendant for sale.

The tobacco in question was, in *October*, 1813, consigned by the plaintiff, a merchant residing at *Richmond* in *Virginia*, to the defendant, a commission merchant in *New-York*, to be sold on commission. The plaintiff, in a letter to the defendant, dated *November 1*, 1813, says that he was in hopes that the tobacco would sell for 20 cents, and that two kegs of it were \*of a quality that sold in *Richmond* for 50 cents a pound; "still," he adds, "you must do the best with it you can, and I shall be satisfied." In a subsequent letter of the plaintiff to the defendant, dated the 14th *November*, 1813, written in reply to a letter of the defendant, in which he remarks upon the quality of the tobacco consigned to him, the plaintiff says, "I do not wish the part which was considered by you as the worst, sold for less than 15 cents, and that which is good at 18 to 20 cents. These

price, which price he obtained by making the before-mentioned agreement, which was more than the ordinary market price, he will be liable according to the rate at which they were sold. (a)

(a) Vide *Toland v. Murray*, 18 *Johns. Rep.* 24. *Murray v. Toland*, 3 *Johns. Ch. Rep.* 569. But see, also, *Caines v. Brisbane*, *supra*, 9.

ALBANY,  
August, 1816.

GUY  
v.  
OAKLEY.  
[\* 332]

Where a consignee sells the goods of his principal, under an agreement, made without the consent of his principal, that the amount of the sale should be set off against

[\* 333] a debt due from his principal, the consignee, acting beyond the scope of his agency, is liable to his principal for the value of the goods; and, if he had directions from the consignee to sell them only at a certain

ALBANY,  
August, 1816.

GUY  
V.  
OAKLEY.

prices, I think, may be obtained in the winter, and I do not like to lose by an article after taking so much trouble to get it to market." This letter the defendant answered on the 20th *November*, 1813, promising to observe the plaintiff's instructions.

On the 9th *November*, 1813, the defendant sold two kegs of tobacco at 18 cents per pound, and on the 1st of *February*, 1814, another keg at 15 cents per pound, for all of which the defendant has been paid. On the 12th of *February*, 1814, the defendant sold and delivered to a purchaser, the residue of the tobacco, part of it at 18 cents, and part at 15 cents, amounting in the whole to 778 dollars and 71 cents, under an agreement made, without the knowledge or consent of the plaintiff, with the purchaser, that the amount of such sale should be credited on a certain promissory note made by the plaintiff, and held by the purchaser, as agent of one *John Parkhill*, for 1,099 dollars and 20 cents; in consequence of which the purchaser allowed a price higher than the then ordinary market price. *Parkhill* had since offered to allow the plaintiff a credit on the note to the amount of the sale, which the plaintiff refused.

A verdict was taken for the plaintiff, subject to the opinion of the Court on the above case.

*P. W. Radcliff*, for the plaintiff.

*T. A. Emmet*, for the defendant.

*Per Curiam.* The plaintiff must have judgment upon the verdict as found, without any deduction. The tobacco was put into the hands of the defendant as a commission merchant, with instructions not to sell under a certain price. The defendant, in his character of commission merchant, had no authority to make any stipulation that the avails of the tobacco should be \*credited upon the plaintiff's note, which was held by *Parkhill*. He probably supposed he was doing an act which would meet the approbation and sanction of the plaintiff. But this was a hazard he took upon himself; it was not within the scope of his agency. If the sale had been made by the defendant, under his first instructions, by which he was vested with discretionary powers, as to price, there would, under the circumstances of the case, be some strong reason for making him responsible only for the market price of the tobacco. He, no doubt, acted in good faith; and, as he supposed, for the best interest of his principal. But the plaintiff, by his subsequent orders, limited the defendant as to the price, and he had no right to sell under it; and he having, in fact, sold at such price, he must be responsible to the plaintiff for the amount of sales at that rate.

[ \* 334 ]

Judgment for the plaintiff.

PRATT *against* HULL.ALBANY,  
August, 1816PRATT  
v.  
HULL.

IN ERROR, to the Court of Common Pleas of the county of Steuben.

*Hull*, the defendant in error, who was plaintiff in the Court below, brought an action of *assumpsit* against *Pratt*, which was tried in *January* last. After the plaintiff below had gone through his evidence, and rested his cause, the counsel for the defendant below moved for a nonsuit, on the ground that the evidence given on the part of the plaintiff was not sufficient to maintain the action. The Court below, being of that opinion, directed the plaintiff to be called and nonsuited; but his counsel refused to submit to a nonsuit, insisting that the Court could not compel the plaintiff to be nonsuited, but that he might, if he thought proper, have his cause submitted to a jury. The Court thereupon permitted the cause to go to the jury, who gave a verdict for the plaintiff for 178 dollars and 45 cents. The defendant having tendered a bill of exceptions to the opinion of the Court below, the case on the bill of exceptions was submitted to this Court without argument; and it was agreed, that if the Court should be of opinion that the plaintiff could be nonsuited against his consent, and that he ought to have submitted to the direction of the Court below, then the judgment should be reversed, otherwise to be affirmed.

A Court of common pleas may compel a plaintiff to be nonsuited against his consent, when, in their opinion, the evidence offered by him is not sufficient to support his action, there being no question of fact to be decided. (a)

[ \* 335 ]

*Per Curiam.* The question presented by the writ of error, in this case, is, whether a Court of common pleas has a right to direct a plaintiff to be nonsuited, when, in their judgment, the testimony offered by him is not sufficient to maintain the action, or whether it is the right of a plaintiff to have his cause submitted to the jury. The answer to this abstract question cannot admit of a doubt. This must be a power vested in the Court. It results, necessarily, from their being made the judges of the law of the case when no facts are in dispute. What the evidence before the Court was, or whether they were correct in their judgment, or not, are questions not now before us. We must assume that there was no dispute about the facts before the Court, or any weighing of testimony falling within the province of the jury; and, therefore, it was a pure question of law, whether, under a given state of facts, the plaintiff was, in law, entitled to recover. And, unless this was a question for the Court, there is no meaning in what has been considered a salutary rule in our Courts of justice, that to questions of law the judges are to respond, and to questions of fact, the jury. If, in this Court, a judge at the circuit should improperly nonsuit a plaintiff, that nonsuit would be set aside, and a new trial granted. And, in the common pleas, a bill of exceptions would lie to the opinion of the Court, as such opinion would be upon a mere matter of law, arising upon facts not disputed. In the case of

(a) *Bells v. Jackson*, 6 *Wendell's Rep.* 173, 203.

ALBANY,  
August, 1816.

JACKSON  
V.  
SOWLE.

*Clements v. Benjamin*, (12 *Johns. Rep.* 298.) it was decided by this Court, that a justice of the peace had a right to nonsuit a plaintiff, when, in his opinion, the testimony offered did not support the action. If this be a power vested in these inferior magistrates, it surely ought not to be denied to the Courts of Common Pleas. The judgment of the Court below must, accordingly, be reversed.

Judgment reversed.

[ \* 336 ] \*JACKSON, *ex dem.* LUDLOW and KETCHAM, *against* SOWLE and SOWLE.

The northern boundary of the patent to Sanders and Heermance, forms the southern boundary of the *Nine Partners Patent*, and there is no intermediate space, or gore, between the two patents.

THIS was an action of ejectment, for land lying in the county of *Dutchess*. The cause was tried at the *Dutchess* circuit, in August, 1814, before his honor the chief justice, and a verdict was taken for the plaintiff, subject to the opinion of the Court, on a case containing the following facts:—

On the 24th of October, 1636, a patent was granted by the government of the province of *New-York*, to *Sanders and Heermance*, for twelve thousand acres of land. Questions having afterwards arisen as to the quantity of land which was intended to be granted to patentees, a number of persons, who had purchased under that patent, applied to the governor and council for a confirmation of their titles, which petition being granted, a warrant of survey, to the surveyor-general of the province, was issued, dated the 23d of January, 1770, directing the farms of the petitioners, among whom was one *David Reed*, to be surveyed, and on the 4th of June, 1772, a patent was issued to *David Reed*, for a lot of land described as follows: "All that certain lot and parcel of land, situate, lying, and being in the county of *Dutchess*, within our province of *New-York*, bounded on the north by a line of marked trees run by the *Nine Partners*; on the south, by a line of marked trees known by the name of the *Indian* line; and, on the east, by a tract of land granted to *Rumbout & Company*, beginning at a walnut-tree, with stones round it, in a line of trees marked for the westerly bounds of the aforesaid tract, granted to *Rumbout & Company*, known by the name of the parallel line, and runs from the said walnut-tree, along the aforesaid *Indian* line of marked trees, north, forty-nine degrees west, twenty-seven chains, north, fifty-four degrees west, twenty-three chains, to a forked white-oak tree standing on the east side of the *Tweede* fly, and to the northward of a small hill, thence north six chains and seventeen links, to the aforementioned line of marked trees known by the name of the *Nine Partners* line, thence along said line, south, 83 degrees, east, 66 chains, and 60 links, to the aforementioned parallel line, the westerly bounds of *Rumbout & Company*, thence \*along said parallel line, southerly, as it runs, to the

[ \* 337 ]

place where this lot first began; containing 100 acres of land, and the usual allowance for highways. The lessors of the plaintiff derived their title from *Reed*.

A. BANY,  
August, 1816.

JACKSON  
v.  
SOWLE.

The defendants claimed title to the premises in question, under the patent to *Caleb Heathcoat* and others, commonly called the *Great Nine Partners Patent*, dated the 27th of May, 1697, for a tract of land described as follows: "A certain tract of vacant land situate, lying, and being on *Hudson's* river, within our *Dutchess* county, bounded on the west by the said *Hudson's* river, between the creek called, by the *Indians*, *Aquasing*, and, by the Christians, the *Fish* creek, at the marked trees of *Pauling*, (including the said creek,) and the land of *Myndert Harmense* [*Heermance*] and company, then bounded southerly by the land of the said *Myndert Harmense* and company, so far as their bound goes, then westerly by the land of the said *Harmense* and company, until a southerly line run so far south until it comes to the south side of a certain meadow, wherein there is a white oak marked with the letters H T, then southerly, by an east and west line, to the division line between this our province and our colony of *Connecticut*, and so easterly by the said division line, and northerly by the aforesaid *Fish* creek, as far as it goes, and from the head of the said creek, by a parallel line, to the south bounds, east and west, reaching the aforesaid division line."

The case made for the opinion of the Court contained a great deal of obscure and contradictory testimony, relating principally to the possessory title set up by the parties. It is thought that the above statement, as to the paper title, on which alone the Court founded their decision, with such facts as are alluded to in the opinion of the Court, will sufficiently explain the points of the case. It was contended, on the part of the plaintiff, that the land in question was included in a tract called the *Gore*, alleged to lie intermediately between the patent of *Sanders* and *Heermance*, and the *Nine Partners* patent; and, on the other hand, it was insisted that the premises were comprehended within the *Nine Partners* patent.

The case was argued by *J. Emmott*, for the plaintiff, and by *P. Ruggles*, and *J. Tallmadge*, for the defendants.

\**Per Curiam*. The plaintiff sets up a right to recover on two grounds, 1st. Upon his paper title; 2d. On his possession.

[ \* 338 ]

It is manifest there can be no *gore* between *Sanders* and *Heermance's* patent, and that called the *Nine Partners* patent; the latter is bounded on the former. All the evidence shows, (and it has not been pretended on the argument,) that the premises do not lie within *Sanders* and *Heermance's* patent; it is equally certain that a line called the *Indian* line, is the well-known northern boundary of that patent; indeed, in the patent to *Reed*, this line is expressly recognized. The description of the

ALBANY,  
August, 1816.

JACKSON  
v.  
SOWLE.

land granted by the *Nine Partners* patent, strongly corroborates the location given by the defendants. The south line is not a straight line; the *Sanders* and *Heermance* patent is a southerly boundary, so far as it goes, and then it becomes a westerly boundary, which could not happen unless there was a deviation in the line. The line set up by the plaintiff as the south line of the *Nine Partners* patent, is a straight line, which is in direct opposition to the expressions in that grant.

It appears, pretty satisfactorily, how the line set up by the plaintiff, as the south line of the *Nine Partners* patent, came to be run as it was. The proprietors, many years since, laid out a tier of water lots on the river, extending four miles back. These were straight lines, extending beyond where the south line of the patent changed its course, and, therefore, not affecting the land lying to the south of this line; and the *Sanders* and *Heermance* patent, confessedly, not extending north of the *Indian* line, gave rise to the idea that the intermediate lands were a gore, and vacant, when, in truth, there could be no such thing.

If it were not satisfactorily explained how, and for what purpose, this line was run, it might be deemed a location by the patentees, of their south boundary, but the facts in the case preclude this conclusion; for it appears that they have claimed and exercised acts of ownership over what is called the gore. It follows that the plaintiff has failed in showing a paper title to the premises, inasmuch as the premises are comprehended in an older patent to the *Nine Partners*. If other considerations were necessary to evince the plaintiff's want of title, it is a strong circumstance, that, since the erection of towns in this state, the tract of land called the great or *Lower Nine Partners*, has been the boundary recognized by the legislature, between the towns \*of *Poughkeepsie* and *Clinton*, and the lands in question are described in the designation as lying in *Clinton*.

As to the possessory right, it would be excessively uninteresting, if not disgusting, to go through and present the confused mass of evidence in relation to it. Suffice it to say, that none of the possessions, prior to those of the defendant's father and of *Thorn*, are definite or continued, but are wholly vague, equivocal and uncertain; sometimes the possession is under the *Nine Partners*, and sometimes under *Reed* and *Ludlow*, and sometimes the possessors are mere intruders. Such a heterogeneous possession ought not to avail against a clear paper title, in opposition to that of the lessors, as no immediate privity is pretended between the lessors and the defendants.

Judgment for the defendants



VROOMAN *against* LAWYER.IN ERROR, on *certiorari* to a justice's Court.

The defendant in error, who was plaintiff in the Court below, brought an action against the plaintiff in error in the Court below, and proved that the bull of the latter had gored his horse; but there was no evidence that the bull had ever before done similar acts, or that he had ever before been unruly. The justice gave judgment for the plaintiff below, the defendant in error.

*Per Curiam.* The judgment is clearly wrong. If damage be done by any domestic animal, kept for use or convenience, the owner is not liable to action on the ground of negligence, without proof that he knew that the animal was accustomed to do mischief. (1 *Ld. Raym.* 109. 2 *Ld. Raym.* 1583. *Buxendin v. Sharp*, 2 *Salk.* 662.)

Judgment reversed.

(a) *Hackley v. Emerson*, 4 *Coven*, 351. 1 *Chitty on Plead.* 69.ALBANY,  
August, 1816.THE PEOPLE  
v.  
NELSON.

The owner of a domestic animal is not liable for injuries which it may have committed, unless he had notice that it was accustomed to do mischief. (a)

\*THE PEOPLE, *ex relat.* BRINKERHOFF, *against* NELSON. [\* 340]

THIS was an indictment for forcible entry and detainer. The proceedings before the justice were removed into this Court by *certiorari*; and the traverse was tried at the *Dutchess* circuit, in August, 1815, before Mr. Justice *Van Ness*. The inquisition taken before a justice of the peace of *Poughkeepsie*, found, "that *Stephen Brinkerhoff*, of *Poughkeepsie*, blacksmith, long since lawfully and peaceably was possessed of, and in, one messuage, with the appurtenances, in *Poughkeepsie*, aforesaid, in the county aforesaid, and his possession so continued, until *Arnold Nelson*, late of the town of *Poughkeepsie*, laborer, on the 8th of *May* instant, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him, the said *Stephen*, thereof dispossessed, and with strong hand expelled; and him, the said *Stephen*, so dispossessed and expelled from the said messuage, with the appurtenances aforesaid, from the said 8th day of *May* until the taking of this inquisition, with like strong hand and armed power did keep out," &c.

At the trial, the relator proved that he and his family had

controvert the facts, by which the relator attempts to show a title in himself. (d)  
A purchaser under a *fi. fa.* at a sheriff's sale, has no right to enter on the premises, unless they are vacant. The sheriff can deliver the legal possession; but in order to obtain actual possession, the purchaser must resort to his action of ejectment.

(b) 2 *R. S.* 509.(c) *Orser v. Storms*, 9 *Cow. Rep.* 687. *Russell v. Doty*, 4 *Cow. Rep.* 576. *Esartson v. Sawyer*, 2 *Wendell*, 507.(d) The title of the defendant is not in question on the trial of an indictment for a forcible entry and detainer. *People v. Rickert*, 8 *Coven*, 226.

ALBANY,  
August, 1816.  
THE PEOPLE  
v.  
NELSON.

lived in the house about two years, and that, in *May, 1815*, *Benjamin Herrick, Arnold Nelson, John Lewis, and Clapp Raymond*, who was a deputy sheriff, were at the house with wagons with furniture, which they were putting into the house, when *Brinkerhoff*, who had been absent, came home, and forbad *Nelson* from taking possession, or entering the house, or doing any thing on the premises; *Raymond*, the deputy sheriff, arrested *Brinkerhoff* on a *ca. sa.*, and took him away. *Mrs. Brinkerhoff* was in the house, and staid there some time. There were no arms or force used, nor any violence. The witness knocked at the door, and was asked to walk in. The relator was absent, and his wife in bed. The business appeared to have been arranged by the deputy sheriff, who took *Brinkerhoff* on the execution; and he delivered all the possession he supposed he had a right to do, by law, to *Herrick*, who then gave possession to *Baldwin*, and he delivered the possession to *Nelson*, who staid there.

[ \* 341 ]

\*The defendant moved to quash the indictment for various defects, and particularly because the interest of the relator in the premises was not set forth; but the judge decided that the defendant could only take advantage of any insufficiency in the indictment, on a motion in arrest of judgment. The defendant offered in evidence a judgment of this Court, in favor of *Leonard Davis*, against *Brinkerhoff*, and a *fiery facias* issued thereon, under which the premises in question were sold at the sheriff's sale to *Herrick*, and a deed executed to him by the sheriff; and to prove that *Raymond*, the deputy sheriff who made the sale, on receiving the money, made the entry on the premises, and delivered the possession to *Herrick*, as stated by the witness of the plaintiff; and that *Herrick* accordingly entered, and which was the entry complained of by the relator. The evidence thus offered was overruled by the judge, who directed the jury to find a verdict against the defendant, and the jury found accordingly.

A motion was made, 1. In arrest of judgment, and, 2. For a new trial; because the judge improperly overruled the evidence offered by the defendant to show a title in himself, and a right to enter.

*J. Tallmadge*, for the defendant, contended, that the indictment contained no description of any estate in the relator. The tenant must allege that he was disseised, and for that purpose he ought to set forth his seisin, or the nature of his estate, so that it may appear that he was seised at the time.† The indictment is, in this respect, clearly defective.

† *People v. Shaw*, 1 *Caines*, 125. *People v. King*, 2 *Caines*, 98. 1 *Ld. Raym.* 610. 4 *Com. Dig.* *Forc. Ent. and Det.* (D+); 3 *Bac. Ab. Forc. Ent. and Det.* (E.)

Next, the evidence offered by the defendant ought to have been received. The deed of the sheriff showed the plaintiff's right of entry. The sheriff had authority to transfer the possession to the purchaser. It is his duty to deliver the possession to him, if required; otherwise, few persons would be willing to become purchasers at a sheriff's sale. There are no *English* ad-

judications on this point, because, in *England*, the fee of the land is never sold on execution. In *M Dougall v. Sitcher*,† the Court held, that a purchaser of real estate, under a *fi. facias*, might enter and take possession in a peaceable manner. After the sale of the land to the sheriff, the tenant becomes, *quasi*, a tenant at will to the purchaser.‡

\**Oakley*, contra. The sheriff has no authority to deliver the actual possession on a *fi. fa*. He cannot turn the tenant out, and put the vendee in, but the purchaser must resort to his action of ejectment.§

Then, as to the sufficiency of this indictment. In the case of *The People v. Leonard*,|| the Court say, that on an indictment for a forcible entry and detainer, the title to the premises does not come in question; and it is enough to entitle the relator to judgment, if he shows that he was in peaceable possession at the time of the defendant's forcible entry. There need be no more alleged in the indictment than is sufficient to enable the plaintiff to recover; and that is a peaceable possession in him at the time. There is, in *Wentworth's Entries*,¶ a precedent of this form of indictment.

*P. Ruggles*, in reply, observed, that in *Hyatt v. Wood*,†† *Spencer, J.*, in delivering the opinion of the Court, lays it down, that no man can recover, upon a claim of right to property, against another whose rights to the subject matter are superior to those of the person so claiming damages for a violation of his supposed rights. It is true, that was a civil action; but the principle is equally applicable to this case.

It is admitted, that possession is evidence of seisin; but that does not dispense with the necessity of alleging a seisin. As in *trover*, the plaintiff must allege a conversion, though a demand and refusal may be sufficient evidence of it.

*SPENCER, J.*, delivered the opinion of the Court. The defendant moves in arrest of judgment, and for a new trial, on the ground, that the evidence offered on his part, which went to show a title in himself to the premises, was overruled.

The inquisition does not state, that *Brinkerhoff* was either seised of the premises, or that he had a term of years therein, yet to come and unexpired: it states only, "that *Stephen Brinkerhoff*, of *Poughkeepsie*, aforesaid, blacksmith, long since lawfully, and peaceably, was possessed of, and in, one messuage, with the appurtenances in, &c., and his possession so continued, until *Arnold Nelson*, late of, &c., on the 8th day of *May* instant, with strong hand and armed power, into the messuage aforesaid, with the appurtenances aforesaid, did enter, and him, the said \**Stephen*, thereof dispossessed, and with strong hand expelled," &c.

There can be no doubt that this indictment is bad in substance. The 6th section of the statute (1 *N. R. L.* 98.) (a) to

(a) 2 *R. S.* 507.

ALBANY,  
August, 1816.

THE PEOPLE  
v.

NELSON.

† 1 *Johns*,  
*Rep.* 42.

† *Jackson*, ex  
dem. *Kane*, v.  
*Sternbergh*, 153.

[ \* 342 ]

§ 2 *Showers*,  
85. 3 *Kemble*,  
243. 3 *Term*  
*Rep.* 295. 2  
*Wms.* *Stam.*  
69. c. n. 2 *Tidd's*  
*Pr.* 960. *Bull.*  
*N. P.* 104.

|| 11 *Johns*,  
*Rep.* 504.

¶ *Went. Pl*  
148.

†† 4 *Johns*  
*Rep.* 170.

[ \* 343 ]

ALBANY,  
August, 1816.  
THE PEOPLE  
v.  
NELSON.

prevent forcible entries and detainers, enacts, that the act "shall extend as well to tenants for years, and guardians, as to such as have estates of freehold." The statute of 21 Jac. ch. 15. extended the remedy of the former statutes of forcible entry and detainer, to lessors for years and copyholders; and in the case of the *Queen v. Taylor*, (7 Mod. 123.) where the indictment was upon the statute of 8 Henry VI., ch. 9., it did not allege that the party had been seised, and disseised by force; and, upon a motion to quash the indictment, Holt, Ch. J., with the concurrence of the whole Court, after stating the extension of the statutes by the statute of 21 James, ch. 15., observes, "The present case is upon the statute of Henry VI., upon which you must always allege a freehold and seisin in somebody, and if it be an entry upon a lessee for years, you must say, the entry was made into the freehold of A., in the possession of B., and so he disseised A.; and of necessity, there must be a disseisin of the freehold laid." The general position of Lord Holt is warranted by all the cases, that the indictment must set forth a seisin, or possession, within the purview of the statute. The party must be shown to be dispossessed of a freehold, or to be disseised of a term of years, yet to come and unexpired. Tenants at will, or sufferance, are not protected by the statute, and yet, if it were not essential to allege the estate, and bring it within the reach of the statute, tenants of that description might avail themselves of the remedy afforded by the statute, contrary to its plain intendment. It is unnecessary to cite further cases from *English* reports. The point has been decided in this Court repeatedly. (*Shaw* ads. *The People*, 1 *Caines*, 125. and *The People v. King*, 2 *Caines*, 98.) In the last case, the late chief justice mentions, also, the case of *Beebe* ads. *The People*, not reported.

As to the second point, the case of *The People v. Leonard* (11 Johns. Rep. 509.) decides, that the right and title of the defendant cannot be gone into; that the statute was made to prevent persons from doing themselves right by force. As it respects the relator's title, I do not mean to be understood, that he is to give precise technical proof, that he has a seisin of a \*freehold, or a term for years; any evidence, from which either of these estates may be inferred, would be sufficient. But, upon the traverse, he must show every material allegation in the indictment to be true; and the estate, we have seen, is material, and it necessarily must be proved. Whatever must be proved, may be disproved, and it follows, naturally, that, though the defendant shall not justify the force, by showing a title in himself, derived from an independent source, or even from the relator himself, he may controvert the facts by which the relator attempts to make out his estate, and may show that he has not such an estate as would enable him to maintain the prosecution. It was urged, on the argument, that it appearing that *Herrick* had purchased the premises, upon a *fi. fa.* against *Brinkerhoff*, he had a right to enter under that purchase, and take possession

Had the premises been vacant, I agree that he might have entered, without any danger from the statute; but they were not vacant; and, notwithstanding what fell from Mr. Justice Livingston, in *M'Dougall v. Sitcher*, (1 Johns. Rep. 43.) I am decidedly of the opinion that the entry was unlawful.

*Tidd* says, speaking of the *elegit*, (vol. 2. p. 941.) it was formerly usual for the sheriff to deliver actual possession of a moiety of the lands, but that he now only delivers legal possession, and, in order to obtain actual possession, the plaintiff must proceed by ejectment; and he states the practice to be the same upon an *extent*. (2 *Tidd's Pr.* 950.) Our practice is, not for the sheriff to deliver possession; he has no authority for doing so; he is commanded merely to sell; and the purchaser has no more right to enter after his purchase than he has to enter upon any other lands in the actual possession of another, and to which he has title.

Indictment quashed.

ALBANY.  
August, 1816

GODFREY  
v.  
VANCOTT.

\*L. & C. GODFREY against VANCOTT.

[ \* 345 ]

IN ERROR, to the Court of Common Pleas of the county of *Sullivan*.

The plaintiffs in error brought an action of debt in the Court below against the defendant in error, on an arbitration bond for the penal sum of 500 dollars, conditioned to abide by, and perform, the award of the arbitrators named therein; and assigned two several breaches. The defendant pleaded *non est factum*. At the trial, the jury found a verdict on the issue, for the plaintiff, and assessed damages at six cents; and, on the first breach assigned, the jury assessed the damages at 12 dollars and 94 cents, and, on the second breach, at six cents; the damages, in all, amounting to 13 dollars and 6 cents. Judgment was entered up in form for the plaintiff, for the penalty of the bond. The defendant objected, that, the damages recovered being less than 25 dollars, the plaintiff could not recover costs, but was bound to pay costs to the defendant; and the plaintiff insisted, that, having recovered a judgment for 500 dollars of debt, they were entitled to full costs. But the Court below decided that the plaintiffs were not entitled to costs, but must pay the defendant his costs, which should be set off against, and deducted from, the amount of the damages assessed by the jury. To this opinion of the Court, the plaintiffs tendered a bill of exceptions, on which the writ of error was brought.

The cause, on the return of the writ of error and bill of exceptions, was submitted to the Court without argument.

*Per Curiam.* This case comes before the Court on a writ of

(a) Vide *Harvey v. Bardwell*, 6 Cow. Rep. 57. *Allendorf v. Stickle*, 2 Cow. Rep. 412. *Fairlie v. Lawson*, 5 Cowen, 424.

In an action of debt on a bond, for the penal sum of 500 dollars, conditioned to abide the award of arbitrators, judgment in form being entered up for the plaintiff for the penalty, though the jury assessed the damages to thirteen dollars only, the plaintiff was held entitled to recover his full costs. (a)

ALBANY,  
August, 1815

JACKSON  
v.  
WOOD.

[ \* 346 ]

error to the common pleas of *Sullivan* county; and the only question presented for decision is, whether the plaintiff below was entitled to recover his costs, or was bound to pay costs to the defendant. The action was debt on the penalty of 500 dollars, in a bond, with a condition to abide by and perform the award of arbitrators. The damages assessed by the jury, under the breaches assigned, were under 25 dollars: the judgment, however, was entered for the penalty, and the Court below decided that the plaintiffs were not entitled to recover costs of the \*defendant. This was incorrect. The plaintiffs were entitled to recover costs; the judgment being upon the penalty. The damages assessed, together with the costs, regulates the amount to be recovered on the execution; but the judgment being in form, upon the penalty, the costs follow of course. The judgment is the test, by which the right to costs is determined; this has been the long and well-settled rule of construction given to the statute relative to costs. (2 *Johns. Cas.* 206. 2 *Caines*, 107. 10 *Johns. Rep.* 219.) The judgment of the Court below must, accordingly, be reversed.

Judgment reversed.

### JACKSON, *ex dem.* SCHENCK and others, *against* WOOD.

In ancient patents, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. (a)

The south boundary of the *Rumbout* patent is an east and west line.

The south boundary of the *Rumbout* patent is the north boundary of the *Phillips* patent, and there is no *gore* or unpatented land between those patents.

[ \* 347 ]

THIS was an action of ejectment for lands in the town of *Fishkill*, in the county of *Dutchess*. The cause was tried before Mr. J. Van Ness, at the *Dutchess* circuit, in August, 1815.

The lessors of the plaintiff claimed under the *Rumbout*, or *Fishkill*, patent, dated the 17th of October, 1685, to Francis *Rumbout*, Jacobus *Kipp*, and Stephenus *Van Cortlandt*. The defendant, whose only right consisted in a possession of ten or twelve years' continuance, resisted the plaintiff's claim, on the ground that the premises were situated in a *gore*, or piece of unpatented land alleged to lie between the *Rumbout* and *Phillips* patents.

By the *Rumbout* patent was granted "All that tract or parcel of land lying and being on the east side of *Hudson's* river, at the north side of the *Highlands*, beginning from the south side of a creek called the *Fishkill*, and, by the *Indians*, *Matteawan*, and from thence, northward, along said *Hudson's* river, 500 roods beyond the *Great Wappins* kill, called by the *Indians* *Ma-wenawasigh*, being the northerly bounds, and from thence into the woods 4 hours going, that is to say, 16 *English* miles, always keeping 500 roods distant from the north side of said *Great Wappinger's* creek, however, it runs, as also from the said *Fishkill* or creek, *Matteawan*, along the said *Fish* creek into the woods \*at the foot of the said high hills, including all the reed or lowlands, at the south side of said creek, with an easterly line four

(a) Vide *Jackson v. Moore*, 6 *Cow. Rep.* 706. *Jackson v. Vedder*, 2 *Caines's Rep.* 210.  
286

hours going, that is to say, 16 *English* miles into the woods, and from thence northerly to the end of the four hours going, to wit, 16 *English* miles, on a line drawn at the north side of the 500 roods beyond the *Great Wappinger* creek or kill, called *Mawna-wasigh*." *Madame Britt* was the heir at law of *Francis Rumbout*. *Francis Britt* was her heir at law, who, on the 10th of *May*, 1794, conveyed his part of the patent, which was the south third of the patent, to *Henry Schenck*, of whom the lessors of the plaintiff are the heirs at law. The *Rumbout* patent is bounded on the south by the *Phillips* patent.

The patent to *Adolph Phillips*, dated the 17th of *June*, 1697, contained the following description: "A certain tract of land in our *Dutchess* county, situate, lying, and being, in the *Highlands*, on the east side of *Hudson's* river, beginning at a certain red cedar-tree, marked, on the north side of the hill, commonly called *Anthony's Nose*, which is, likewise, the north bounds of Colonel *Stephanus Cortlandt's* land, or his manor of *Cortlandt*, and from thence bounded by the said *Hudson's* river, as the said river runs, northerly, until it comes to the creek, river, or run of water, commonly called and known by the name of the great *Fishkill*, to the northward and above the said *Highlands*, which is likewise the southward bounds of another tract of land belonging unto the said Colonel *Stephanus Cortlandt* and company, and so easterly along the said Colonel *Cortlandt's* line, and the south bounds of Colonel *Henry Beekman*, until it comes twenty miles, or until the division or partition line between our colony of *Connecticut*, and our said province, and easterly by the said division line, being bounded northerly and southerly by east and west lines, unto the said division line between our said colony of *Connecticut*, and this our province aforesaid, the whole being bounded westward by the said *Hudson's* river, northward by the land of Colonel *Cortlandt* and company, and the land of Colonel *Beekman*, eastward by the partition line between our colony of *Connecticut* and this our province, and southerly by the manor of *Cortlandt*, to the land of the said Colonel *Cortlandt*, including," &c.

The boundary between the patents to *Rumbout* and *Phillips* forms the boundary of the towns of *Fishkill* and *Phillips*. The farms in that part of the alleged *gore*, which was in the vicinity of the premises in question, were held under titles derived from *Schenck*. In another part of the *gore* were persons who held merely by possession, without claim of title; and the *gore* had always been claimed by *Schenck* as being within his part of the *Rumbout* patent. In 1785, there was an arbitration between *Schenck* and many of the settlers, and, when it was decided, all who were parties to the arbitration took under *Schenck*, or moved off.

The case made for the opinion of the Court contained a great deal of evidence relating to the actual location of the *Rumbout* patent, which it would be very difficult to render intelligible,

ALBANY,  
August, 1816.

JACKSON  
v.  
W.C.D.

[ \* 348 ]

ALBANY,  
August, 1816.

JACKSON  
v.  
WOOD.

and of which it is not thought necessary to attempt to give a statement. A verdict was taken for the plaintiff, subject to the opinion of the Court.

*E. Williams, and J. Tallmadge, for the plaintiff.*

*Oakley, contra.*

THOMPSON, Ch. J., delivered the opinion of the Court. If the *Rumbout* or *Fishkill* patent was now, for the first time, to receive a construction and location, I should very much incline to adopt that which has been given to it by the defendant's counsel. Upon this abstract question, however, the Court do not mean to express any opinion. But in grants of such antiquity, where the description of the land is vague and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight, in the location of the grant. It ought, also, to be noticed, in the outset, that the defendant in this action does not pretend to claim or set up any title to the premises in question, but rests entirely upon his possession, and that not of more than ten or twelve years' continuance, and this possession held under the idea that it was not conveyed by any patent, but formed a part of a gore between the *Rumbout* and *Phillips* patent. This pretension must be laid out of view as altogether unfounded. *Phillips's* patent, which lies on the south, is expressly bounded on the south line of this patent, which makes it impossible that there should be any vacant land between the two patents. Construing the *Rumbout* patent, *per se*, there is nothing in it which requires the south bounds to be an east and west line.

[ \* 349 ]

\*The more natural construction would be that the southern boundary was formed by the *Fish Creek*, and the lowlands on the south side thereof, without extending at all up the hills; and this location would best satisfy the general description given to the land intended to be included in the patent, to wit, lands lying on the north side of the *Highlands*; whereas, the south line, set up on the part of the plaintiff, extends several miles upon the hills, beyond the lowlands. But in the patent to *Phillips*, which was only twelve years later, the north line of the land granted is not only described as being the southward bounds of the *Rumbout* patent, but this line is expressly designated as an east and west line. This may be considered a contemporaneous act of the government, showing their construction of the former grant; but this, it is true, would not have been binding upon the patentee, if the interpretation was not warranted by the terms of the grant. That construction, however, has always been acquiesced in by the proprietors of the *Phillips* patent; and no pretension ever appears to have been set up to a line north of the one as claimed by the lessors of the plaintiff. The suggestion of the defendant's counsel, that



the *Phillips* patent might have been intentionally so located, as to leave out a part of the land covered by it, does not appear to be warranted by any evidence in the case. And there is nothing showing any act of the proprietors of the *Rumbout* patent, whereby they have recognized a line running along the foot of the hills as their south line. The various acts of the legislature, from the year 1737 to the present day, dividing this part of the country into precincts and towns, and in which the line, as now set up on the part of the plaintiff, has been recognized as the true line between the patents, is a strong corroboration of this construction. There are many other facts in the case which might be noticed, tending to the same conclusion. And, whatever doubts there might have been, originally, as to the true location of the south line of this patent, it is too late now to call it in question. It was not pretended, on the argument, that, if the *Rumbout* patent covered the premises in question, the plaintiff was entitled to recover. Judgment must accordingly be given for the plaintiff.

Judgment for the plaintiff.

ALBANY,  
August, 1816.

PENFIELD  
v.  
CARPENDER.

\*PENFIELD against CARPENDER.

[ \* 350 ]

IN ERROR, on a *certiorari* to a justice's Court.

The action, in the Court below, was to recover damages for sheep, belonging to the plaintiff, killed by the defendant's dog. At the trial, a witness was called, on behalf of the defendant, to prove a conversation between him and the defendant, in which the latter had denied that he was the owner of the dog; the testimony was objected to, but the justice decided that the witness might go through with his testimony, and that he would then inform the jury what part was admissible, and what not. And the justice informed the jury that the testimony was inadmissible, and that they ought not to take any notice of it as testimony. Another witness was, in the same manner, permitted to swear as to hearsay respecting the ownership of the dog; and the justice then told the jury, as before, that what the witness had sworn was not evidence. A verdict was found for the defendant; and the justice included in the defendant's judgment all the costs which had accrued on the part of the plaintiff, viz. summons, constable's fees, swearing plaintiff's witnesses, &c.

Improper evidences should not be admitted to go to the jury, and it is not sufficient, afterwards, to direct them to disregard it. (a)

In a judgment for the defendant, in a justice's Court, it is improper to include costs which accrued on the part of the plaintiff. (b)

*Per Curiam.* The admission of such testimony was illegal and dangerous, and no subsequent caution or advice by the justice, that the jury ought to disregard what the witnesses had sworn, can cure the irregularity. The law forbids such testimony, because it *may have* an influence upon honest jurors, who

(a) *S. P. Irvine v. Cook*, 15 Johns. Rep. 238. *Tuttle v. Hunt*, 2 Cowen, 436.

(b) *Vide Bronson v. Mann*, *infra*, 460. *Timmerman v. Morrison*, 14 Johns. Rep. 369. *Williams v. Sherman*, 15 Id. 196

ALBANY,  
August, 1816.  
THE PEOPLE  
v.  
CASBORUS.

are unconscious of the impressions which they retain, notwithstanding the effort of the Court to obliterate them.  
The taxation of costs was also illegal.

Judgment reversed.

[ \* 351 ]

\*THE PEOPLE *against* CASBORUS.

The arresting of judgment, after a conviction on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. (a)

THE defendant was indicted at the Court of General Sessions of the Peace held in and for the county of *Rensselaer*, in *February* last, for stealing certain promissory notes. The defendant pleaded, in bar, that, at the preceding *November* term of the Court of General Sessions, &c., he was indicted for felony, and was tried and convicted by the jury; and that, afterwards, on a motion in arrest of judgment, the Court of General Sessions arrested the judgment, and discharged the defendant from that indictment. To this plea the district attorney demurred; and at the Court of Oyer and Terminer, held in the county of *Rensselaer*, the plea in bar was overruled by the Court, and the defendant was afterwards tried, in that Court, upon the plea of not guilty, and convicted of the felony charged in the indictment, and sentenced to imprisonment for seven years in the state prison.

The Court of General Sessions arrested the judgment on the first indictment, on the ground of its being defective; and the present indictment, on which the defendant was tried and convicted, was, in every respect, precisely similar to the first.

SPENCER, J., delivered the opinion of the Court. The defendant, on his arraignment, pleaded, that he had before been indicted, tried, and convicted, for the same felony; that, upon his motion, the judgment had been arrested, and that he had been discharged from that judgment. It is admitted, that the former and present indictment are, in every respect, similar. To this plea the district attorney demurred; the plea was overruled, and the defendant was thereupon tried and convicted, and sentenced to imprisonment in the state prison.

It was decided in the case of *The People v. Barret & Ward*, (1 *Johns. Rep.* 66.) that a person, after an acquittal, might be indicted and tried the second time, if the first indictment was erroneous, so that no good judgment could be given upon it; and where a Court of competent jurisdiction arrest a judgment at the instance of the defendant, it must be intended, legally, that the indictment was vicious, for the judgment cannot be reviewed \*on a writ of error; as an arrest of judgment is a mere refusal, on the part of the Court, to give judgment, every Court is bound to pay that respect to a Court of co-ordinate jurisdic-

[ \* 352 ]

(a) So, when the jury are discharged against the consent of the defendant, the prisoner may be brought to trial a second time for the same offence. *People v. Olcott*, 2 *Johns Cas.* 301.

tion, as to presume its judgment to be according to law, when it is presented for consideration collaterally.

The effect of arresting a judgment is the same as quashing an indictment; the latter happens before trial, the former after; and, in this case, it appears to me, that as no writ of error could be brought upon the decision of the Court of Sessions arresting the judgment, that proceeding is not a bar to any other for the same matter. In analogy to civil cases, the arrest of judgment cannot be pleaded in bar to another prosecution for the same matter, because there is no judgment of the Court susceptible of review.

It is stated here, that the two indictments are, in every respect, similar; but this is not so pleaded, and, if it had been, the consequence would be the same; as already observed, in this collateral way, we must presume, from the judgment being arrested, that the indictment was erroneous, and if erroneous, then a conviction would not bar another good indictment. It is in vain to say, either that the former indictment was good, or that this, being like it, must be holden to be bad also, because the other was adjudged to be bad. We must take it as a settled point, that the other indictment was bad, however the fact may be; and we are not to be told, that this is a bad indictment, merely on the authority of the sessions. We must see if it be bad, and this is not even pretended.

For these reasons, I think the plea of *autrefois acquit* was properly overruled, and such is the opinion of the Court.

ALBANY,  
August, 1816.

MECHANICS'  
BANK  
V.  
HAZARD

**\*THE PRESIDENT, DIRECTORS AND COMPANY OF THE  
MECHANICS' BANK, IN THE CITY OF NEW-YORK,  
against THOMAS HAZARD.**

[ \* 353 ]

THIS was an action of debt on a recognizance of bail. The original suit was against *John Hazard*, on a promissory note, in which judgment was obtained as of *January* term, 1812, for 1,094 dollars and 8 cents damages and costs. The defendants pleaded, 1. Payment by the principal before the commencement of the suit against the bail, to wit, on the 1st of *April*, 1812. 2. That the plaintiffs recovered their judgment against *John Hazard*, as the maker of a promissory note, dated the 16th of *April*, 1811, payable sixty days after date, to *Johnson Patten*, or order, for 987 dollars and 17 cents, and endorsed by him to *William G. Miller, jun.*, and by *Miller* to the plaintiffs; that *Miller*, being liable as such endorser, afterwards, and before the commencement of this suit, to wit, on the 1st of *April*, 1812, paid and satisfied to the plaintiffs the amount of the judgment.

In an action on a recognizance of bail, under a plea of payment, evidence of payment of a less sum than the amount of the judgment is inadmissible.

Nor could payment of a less sum be pleaded, although accepted in full satisfaction.

Where suits are brought against the maker and endorser of a

promissory note, and the endorser pays the amount, and it is agreed between the holder and endorser that the suit against the maker shall be prosecuted for the benefit of the endorser, the maker cannot avail himself of the payment by the endorser as a defence in the suit against him.

And the payment by the endorser having been made after judgment against the maker of the note, his bail cannot avail himself of the defence in a suit on the recognizance.

ALBANY,  
August, 1816.  
MECHANICS'  
BANK  
v.  
HAZARD.

The plaintiffs replied to both pleas, denying the facts stated in them. The cause was tried before Mr. J. *Spencer*, at the *New-York* sittings, in *November*, 1815.

It was proved, that, at the time the suit against *John Hazard* was commenced, suits were also commenced against *Patten* and *Miller*. On the 22d of *November*, 1811, *Miller* offered his own note, with an endorser, at 60 days, for 1,500 dollars, to be discounted by the plaintiffs; the note was discounted, and out of the net proceeds thereof, the plaintiffs, with the consent of *Miller*, retained 1,017 dollars and 31 cents for the principal and interest then due on the note, and agreed with him that the respective suits against *Hazard* and *Patten* should proceed for his benefit; the note given by *Miller*, after having been once or twice renewed, was paid, but *Miller* never paid the plaintiffs the costs of the suit against him, or the costs in the other suits. Judgments having been recovered against *Patten* and *Miller*, *Patten*, on the 8th of *February*, 1812, paid the principal and interest then due on the note to the plaintiffs' attorney, who, by the directions of the plaintiffs, paid over the money to *Miller* and *Patten*, at the same time paid the costs in the suits against \*himself, *Miller* and *Hazard*; and it was agreed by the plaintiffs' attorney, on the behalf of the plaintiffs, who afterwards ratified his act, that the suit against *J. Hazard* should proceed for the benefit of *Patten*, and if a judgment should not be perfected therein, by reason of the non-payment of the costs, which *Hazard* had before been ordered by the Court to pay, as a condition of being allowed to plead his discharge under the insolvent act, *puis darrien continuance*, after an inquest had been taken against him, and which he had not yet paid, the judgment should be held for the benefit of *Patten*; or, if those costs were paid by *Hazard*, they were to be repaid to *Patten*. Judgment was afterwards entered up against *Hazard*. There was never any regular assignment of the judgment to *Patten*; but the present suit was prosecuted at the expense and for the sole benefit of *Patten*, the plaintiffs having been satisfied the full amount of the principal and interest due them, with the costs of their several suits.

A verdict was taken, subject to the opinion of the Court, for the plaintiffs, for 260 dollars and 57 cents, being the interest on the judgment against *John Hazard*, from the time the defendant became fixed as bail, and 6 cents costs.

*T. A. Emmet*, for the plaintiffs, contended, 1. That the parol evidence of the payment and satisfaction of the judgment recovered against *John Hazard*, was inadmissible, the judgment being unpaid and unsatisfied of record. Under neither of the pleas ought parol evidence of any payments to the plaintiffs, prior to *January*, 1812, to have been admitted; as it would only tend to falsify the judgment obtained against *John Hazard*. And if the payment was of such a nature as to diminish or ex

tinguish the demand of the plaintiffs against him, it ought to have been taken advantage of in the original suit.†

2. That the defendant could not maintain either of his pleas, by proving payment of a less sum than the amount of that judgment and the costs.‡

3. That the payment made by *William G. Miller, jun.*, in part discharge of the demand against himself, could not, under the circumstances of the case, be applied, by *John Hazard* or the defendant, towards the payment of the judgment against the former.

4. That *Miller* having repaid the amount paid by him to the plaintiffs, by *Johnson Patten*, before judgment was perfected \*against *John Hazard*, *Patten* was entitled, as against *John Hazard*, to stand in the place of *Miller*, so as to have the benefit of any agreement he had made with the plaintiffs.§

5. That *Patten*, by virtue of his agreement with the attorney of the plaintiffs, and of his settlement with *Miller*, had a right to have the suit then pending against *John Hazard* carried on for his own benefit; and to perfect this right, no assignment of the judgment was necessary, nor could, in fact, any assignment of it have been made, as, at the time of that agreement and settlement, no judgment had been perfected against *John Hazard*.

6. That there can be no impediment to the recovery of the plaintiffs at law; and if there be any questions of equity between the parties affected by, or interested in, that judgment, this Court will leave them to their remedy in a Court of chancery.

7. That the defendant cannot stand in a better situation, as bail for *John Hazard*, than the principal himself could have done on an execution issued upon the judgment.

8. But, at all events, the plaintiffs are entitled to have the verdict entered for the amount of the costs in the respective suits against *John Hazard*, *Miller* and *Patten*.

*Colden*, and *Drake*, contra, contended that the plaintiffs, having taken issue on the fact of payment, were too late to object to the evidence, and ought to have demurred; and if so, there is an end to the cause; for if the payment is the only issue between the parties, the defendant must have judgment on the evidence. But it is said, this suit is prosecuted for the benefit of the surety, *Patten*. In order, however, to avail himself of the privilege of a surety, he ought to have averred the fact of suretiship, and put it on record.||

Under the pleadings in this cause, evidence of the assignment of the judgment in the original suit was wholly inadmissible,¶ the issue being only as to the payment, and if admissible it was insufficient; if there was any assignment, it was to *Miller*, not to *Patten*; but there was none. This Court allow an assignee to stand in the place of the assignor to preserve a specific lien; but here the plaintiffs attempt greatly to extend that privilege.

ALBANY,  
August, 1816.

MECHANICS'-  
BANK

V.  
HAZARD.

† 9 Johns.  
Rep. 392.

‡ 9 Johns.  
Rep. 333. 2  
Lev. 212.  
Styles, 324.

[ \* 355 ]

§ 2 Johns. Cas.  
229, 230, 231. 2  
Vern. 608. 11  
Vesey, 22. Cla-  
son v. Morris,  
10 Johns. Rep.  
524, 536, 539.

|| 1 Chitty's  
Pl. 347. 302.

¶ 3 Johns  
Rep. 425. 1  
Johns. Cas. 411.  
7 Term Rep.  
690. n. (b) 1  
Bos. & Pull.  
447.

ALBANY,  
August, 1816.  
MECHANICS'  
BANK  
v.  
HAZARD.  
[\* 356]

† 10 Johns.  
Rep. 594.

The plaintiffs could not make an assignment which would put *Patten* in their situation. There was no privity between the plaintiffs and *John Hazard*, but there was a privity between \**Hazard* and *Patten*. The plaintiffs are endorsees. The judgment was obtained against *Patten* in *January*, 1812; and whether docketed or not, can make no difference; and the money was paid to the plaintiffs after that time. The note was not payment until actually paid. The plaintiffs, therefore, having received full satisfaction, this suit cannot be maintained in their names for the benefit of *Patten*. From the mere fact of endorsement, the Court will not infer that suretiship which would give *Patten* this peculiar privilege. Bail are sureties, and entitled to all the privileges and advantages of sureties.† In this respect, therefore, the defendant stands on the ground of equal equity, at least, with *Patten*.

Again; the agreements and arrangements made by the plaintiffs, and their attorneys, with *Miller* and *Patten*, without the privity or consent of the bail or principal, altered and extended the responsibility of the bail, and thereby operated as a discharge of the bail from all responsibility.‡

‡ *Ludlow v. Simond*, 2  
*Caines's Cases in Error*, 1. 1  
*Ves.* 339. 2  
*Ves.* 569. *Rathbone v. Warren*,  
10 Johns Rep. 587.

*Emmet*, in reply, said, that if the principal had paid the judgment, it would enure to the benefit of his surety; but where the payment is collateral only, or by one of two sureties, it may, or may not, according to circumstances, operate to the benefit of the other surety. Why may not a surety avail himself of a contract, by which he may protect himself by buying in the rights of a prior creditor? Will the Court consider that as a payment which the parties themselves did not intend as a payment? In regard to the plaintiffs, this is a case of trust, rather than an assignment, arising on the payment of money under a specific agreement. If the plaintiffs accepted the note as payment, at the time, it is not competent for another person to say it was not payment.

THOMPSON, Ch. J., delivered the opinion of the Court. This is an action of debt against the defendant, on his recognizance of bail for *John Hazard*. Judgment against the principal was obtained in *January* term, 1812, for 1,094 dollars and 8 cents. The defendant pleads, 1st. Payment, by the principal, of the judgment, before the commencement of this suit, to wit, the 1st of *April*, 1812. 2d. Payment by *William G. Miller*, who was an endorser upon *John Hazard's* note, and who had become liable to pay the same, the time of payment being the same as in the \*first plea. The plaintiffs take issue upon the pleas; and the first question which arises is, whether the proof supports the pleas, or either of them. There is no evidence, in any manner, showing payment by the principal. Under the second plea, however, it appears, that *Miller*, on the 2d of *November*, 1811, procured a note to be discounted by the plaintiffs, and that 1,017 dollars and 31 cents of the money was to be applied

\* 357.]

to the payment of the principal and interest due upon the note, on which the suit against *John Hazard* was pending. *Miller's* note was renewed several times; and when it was paid does not appear; probably, not until after the judgment was obtained against *John Hazard*. This proof did not support the plea. It did not show a payment of the full amount of the judgment. Had the plea set out the true sum paid, it would have been bad on demurrer, and, of course, no defence. And, if so, it follows, of course, that the fact itself is no bar; for, in case of demurrer, the fact is admitted. In the case of *Dederick v. Leman*, (9 *Johns. Rep.* 333.) it was decided by this Court, that a plea of payment of a less sum than was due on a bond, although accepted in full satisfaction, was not good, either as a plea of payment, or of accord and satisfaction. And, besides, the payment made by *Miller* was before the judgment obtained against *Hazard*; for, although made by *Miller's* note, discounted by the plaintiffs, it was received by them as payment, and the sum due on *Hazard's* note was, doubtless, passed to *Miller's* credit. The understanding of *Miller*, that, if his note was not paid, the plaintiff would have had a right to retain the money, if any, collected from *John Hazard*, could not materially affect the transaction. It was a payment at that time, subject, however, to be reimbursed, out of an uncertain fund, upon the event of the note's not being paid. In strictness, therefore, the facts given in evidence do not show a satisfaction of the judgment against *John Hazard*. There was, at all events, no payment of the costs due on that suit; and the next question that arises is, whether the defendant can avail himself of that payment *pro tanto*; and I am inclined to think he cannot. It was not a payment made by, or in behalf of, *John Hazard*, nor of which he could, in any manner, avail himself; and, if he could not, his bail cannot. The payment was made under an express agreement that the suit against *John Hazard* should proceed for the benefit of *Miller*, his endorser. Had the plaintiffs remained the real parties to \*the suit, perhaps the defendant might, in some way, in equity, certainly, if not at law, have availed himself of such payment, according to what was said by this Court in *Wattles v. Laird*, (9 *Johns. Rep.* 327.) But the plaintiffs, by their agreement with *Miller*, became mere nominal parties; and we have a right so to consider them, and look at, and protect, the real parties in interest. All considerations of hardship must be laid out of view. They apply with as much force to the endorsers of *John Hazard* as to his bail; and when a loss must fall upon one of two innocent persons, each has a right to claim protection under whatever strict and rigid rules of law are to be found in his favor; and according to which the plaintiffs are, in my opinion, entitled to recover the full amount of the judgment and interest; and this is the opinion of the Court.

ALBANY.  
August, 1816.

MECHANICS'  
BANK  
V.  
HAZARD

[ \* 358 ]

Judgment for the plaintiffs.

ALBANY.  
August, 1816.

KETCHUM  
v.  
EVERTSON.

Where A. delivered six sheep to B., on an agreement that, at the end of a year, B. would deliver A. an equal number of sheep of equal value, it was held that the property in the sheep was changed, and that B. was bound to deliver six sheep of equal value to A. at the expiration of the year, although part of the sheep had been taken under an attachment against A.  
[\* 359]

### WILSON against FINNEY.

IN ERROR, on *certiorari* to a justice's Court.

Some time in June, 1812, the plaintiff in error, who was also plaintiff in the Court below, delivered to the defendant six sheep, in consideration whereof the defendant promised and undertook to return and deliver to the plaintiff, at the expiration of one year, an equal number of sheep, of equal value, and also one pound of wool per head for each sheep. The defendant had neglected to deliver the sheep according to his agreement. It further appeared that four of the sheep had been given up by the defendant, as the property of the plaintiff, on an attachment issued against him, in favor of one of his creditors, on the creditor indemnifying the defendant. A verdict and judgment were given for the defendant in the Court below.

*Per Curiam.* This judgment cannot be supported. There is no color for depriving the plaintiff of a recovery for the value of two sheep, as there is no pretence that more than four were taken under the attachment against him. But the plaintiff was entitled to recover for the whole number. The property in the sheep, delivered by the plaintiff, was changed, and duly vested in the defendant. He was under no obligation to return the same sheep, but only those of equal value. They were at his absolute disposal and risk.

Judgment reversed.

### KETCHUM & SWEET against G. B. EVERTSON.

Where a person agreed to sell land to another, and covenanted "to give a deed of the premises" to him, at a certain time and place, the tender of a mere quit-claim deed, without covenant or warranty, is a performance of the covenant; nor is it necessary that the wife of the vendor should join in the deed.

THIS was an action of *assumpsit*. The declaration contained the usual money counts, and a count upon an *insimul computassent*.

On the 8th of March, 1811, the parties at Poughkeepsie entered into a written agreement, by which the defendant contracted to sell to the plaintiff a place called "the Four Corners, in the town of Washington, and the lands included in a mortgage given by Ebenezer Haight to Nehemiah Rogers and Daniel R. Lambert, dated the 18th of June, 1809," for the consideration of 6,000 dollars, part of which, viz. 700 dollars, was to be paid on the 1st day of May, ensuing the date of agreement, and

that the wife of the vendor should join in the deed. A party who has advanced money, or done any act in part performance of an agreement, but refuses to proceed to the completion and execution of the contract, the other party having performed, or being ready to perform, every thing agreed to be done on his part, cannot recover back the money he has advanced, nor is he entitled to compensation for what he may have done in part performance; and, after such refusal to proceed, or voluntary abandonment of the contract, by the vendee, the vendor is at liberty to sell the land to another. (a)

(a) Vide *Stephens v. Beard*, 4 *Wendell's Rep.* 606. *Dox v. Day*, 3 *Ibid.* 356. *Lantry v. Parks*, 8 *Conn. Rep.* 63. *Dearborn v. Cross*, 7 *Ibid.* 48. *Fuller v. Hubbard*, 6 *Ibid.* 13. *Ellis v. Hoskie*, 14 *John. Rep.* 263. *Gazley v. Price*, 16 *Id.* 307.; and see, also, the cases cited, *infra*, p. 361 note (a).



the residue of the purchase money, over the sum of 4,000 dollars, to be secured by a mortgage, by the plaintiffs, to *Rogers* and *Lambert*, to be paid in three annual instalments, and the residue, to wit, the sum of 4,000 dollars, due to the heirs of *Nicholas Everton*, deceased, either to remain under the mortgage, then existing, or a new mortgage to be given by the plaintiffs, as the defendant should elect; the whole business to be transacted, and the defendant to give a deed of the premises to the plaintiffs on the 1st day of *May*, then next, at the office of *Rudd* and *Everton*, in *Poughkeepsie*.

ALBANY,  
August, 1816.

KETCHUM  
v.  
EVERTSON.

The plaintiffs entered into possession of the premises under this agreement. On the first of *May*, 1811, a quit-claim deed for the premises, to the plaintiffs, executed by the defendant, but not by his wife, was left at the office of *Rudd* and *Everton*, in *Poughkeepsie*, ready to be delivered to the plaintiffs, who did not call for it until in the month of *October*, following, when *Ketchum* requested the defendant to give up the contract, observing that his partner, *Sweet*, had failed; but the defendant refused to rescind the agreement. *Ketchum* then objected that the deed was a mere quit-claim, and did not contain the usual covenants of seisin, &c., or warranty, nor was it signed by the wife of the defendant. The defendant said the boundaries were according to the mortgage of *Rogers* and *Lambert*, under which the plaintiffs had purchased, that the deed was pursuant to the agreement, and the only one he intended to give; and having performed every thing he was bound to do by the contract, he should not give it up; but that he was willing to rectify any mistake about the boundary. *Ketchum* then tendered a deed to the defendant, with covenants and warranty, who refused to execute it. *Ketchum* then said he considered the contract as at an end, and demanded the 700 dollars, which, it appeared, had been paid by the plaintiffs, on the 8th of *May*, 1811, and was applied to pay the interest on the mortgage to *N. Everton*, and the costs due to the attorneys of *Rogers* and *Lambert*. The plaintiffs quitted the premises in *February* following, and in *March* the keys were tendered to the defendant, who refused to take them.

[\* 360 ]

In 1813, the defendant sold the premises to *Stephen Allen*, for the consideration of 4,560 dollars, by a quit-claim deed.

It appeared that the property was about to be sold under the mortgage to *Rogers* and *Lambert*, and that *Rudd* and *Everton*, attorneys for them, requested the defendant to buy in the property at the sale, in order to save something on that mortgage, there being a prior mortgage to *N. Everton*; and that the defendant, accordingly, became a mere nominal purchaser; that the sum of 6,000 dollars, which the plaintiffs agreed to pay, was not enough to satisfy both mortgages; and that the plaintiffs, before they made the contract, knew how the defendant acquired the title.

The judge was of opinion, that the plaintiffs were entitled to

ALBANY,  
August, 1816.

KETCHUM  
v.  
EVERTSON.

recover. The defendant claimed a deduction for two years' value of the property, for the time the plaintiffs had kept him out of possession, which was rejected by the judge. The jury found a verdict for the plaintiffs, for the 700 dollars and interest.

A motion was made to set aside the verdict, and for a new trial.

[ \* 361 ]

\**P. Ruggles*, for the defendant, contended, 1. That the defendant was a mere *trustee* in the business, without any interest, and that his *cestui que trusts*, if any persons, were alone answerable. There was a resulting trust to *Rogers* and *Lambert*, who advanced the purchase money, or what was equivalent. They must be considered as the real owners. The defendant is a mere nominal purchaser, at their request, and for their benefit.† It is not necessary for the wife of a trustee to join in a conveyance; for she cannot claim dower in the trust estate.‡

† 1 *Johns. Rep.* 45. n. *Jackson v. Sternbergh*, 1 *Johns. Cas.* 153. 3 *Johns. Rep.* 216. 11 *Johns. Rep.* 91.

‡ 1 *Cruise's Dig.* 334. s. 24. *Sugd. L. of Vend.* 218, 219. 2 *Ves.* 631. 638. 2 *Freeman's Rep.* 43. 71. *Co. Litt.* 31.

§ 12 *Johns. Rep.* 436.

¶ 7 *Johns. Rep.* 179. 1 *Chitty's Pl.* 25.

2. The deed executed by the defendant was according to the contract; he was not bound, by the terms of the agreement, to give a deed with covenants or warranty; and, being a mere nominal owner, he could never have intended to bind himself to warrant the title.§

3. The defendant, as agent or trustee, had paid over all the money he had received, before the contract was rescinded, and he cannot, therefore, be now called on to pay it to the plaintiffs.||

4. The plaintiffs have voluntarily rescinded the contract, and have, therefore, no right to recover back what they have paid in part performance.

5. But even if the plaintiffs were entitled to recover, the evidence offered by the defendant to reduce the amount of damages claimed, ought to have been received. The plaintiffs had the use of the property, and ought to pay for that use. There was no necessity of pleading, or giving notice of this. The defendant had a right to sell the property, after the plaintiffs refused to accept the deed.

*Oakley*, contra. 1. The deed tendered by the defendant was not such a deed as the plaintiffs were entitled to, under a fair construction of the contract. He had, therefore, a right to regard the contract as rescinded. He was entitled to a deed with the usual covenants. It is true, that the Court, in the case of *Van Eps v. The City of Schenectady*,¶ have recently decided, that an agreement to execute a deed of land was satisfied by a deed without warranty or covenants, a decision of which I was not before aware; but I did suppose that the grantor, under an agreement of this kind, was, at least, bound to covenant against his own acts;†† but the deed offered was a mere quit-claim, without any covenant whatever.

¶ 12 *Johns. Rep.* 436. (a)

†† *Sugd. Law of Vend.* 296. 2 *B. & P.* 588.

(a) Vide *Wood v. Young*, 5 *Wendell's Rep.* 620. *Henry v. Cuyler*, 17 *Johns. Rep.* 460. *Cullen v. Knickerbacker*, 2 *Cow. Rep.* 31. 2 *Wendell's Rep.* 146. *Campbell v. Stokes*, 2 *Wendell's Rep.* 146. *Houghton v. Starr*, 4 *Ibid.* 179. *Safford v. Stevens*, 2 *Ibid.* 165.

\*Again; the deed was not executed by the wife of the defendant. In *Jones v. Gardner*,† the Court held that the tender of a deed not signed by the wife of the grantor, and which did not embrace all the land of the farm sold, was not a performance of a covenant to convey. It is true, that a Court of equity would relieve against a claim of dower by the wife of a trustee. But the defendant had held the premises for some time, and was the legal owner. It was a resulting trust, resting in parol, and it would be hard to oblige the vendee to preserve evidence of that trust, to repel, at any time hereafter, a claim of dower.

2. The defendant, having, by his sale of the premises to *Allen*, put it out of his power to convey to the plaintiffs, has voluntarily abandoned the contract with them, and ought to refund the money he has received.‡ The cases as to a vendor's power to resell the property and claim of the first vendee, the difference in price relates to personal, not to real estate.

The doctrine as to an agent paying over the money to his principal, cannot apply here. The defendant has not, in fact, paid over any money. A mere promise to pay over is not equivalent to an actual payment.§ Besides, in such cases, there should be notice that the money has been paid over.

3. The defendant, acting as an agent or trustee generally in regard to this business, and contracting personally, is liable on his personal contract.|| The agreement contains no mention of any trust, nor any reference to a principal, but is wholly in the name of the defendant, and he might, in equity, have been compelled to a specific performance of the contract. He does not appear in the character of an agent; he was the sole legal owner of the property, and appeared as principal in the transaction throughout.

4. As to the claim for the use and occupation; where a party refuses to perform a contract, and voluntarily abandons it, he virtually abandons all collateral benefits or advantages derived from use, or occupation, or improvement. It is as if the contract had never been made. This principle was laid down in the case of *Gillet v. Maynard*.

*D. B. Ogden*, in reply, said, that this was, in truth, an action brought by a party who had violated, or voluntarily rescinded, his contract to recover back the money he had paid; but that a party could never make a breach of his own contract the foundation \*of an action. That the defendant was a trustee was a fact known to all the parties; and the execution of the deed by the wife of the defendant was, therefore, wholly immaterial. The boundaries of the land being according to the mortgage, the plaintiffs were bound to accept the deed. If so, they cannot maintain this action. After their refusal, the defendant had a right to sell the land. He sold it for 1,500 dollars less than the sum which the plaintiff stipulated to give; and he might well call on them to pay that difference, rather than be subjected to

ALBANY,  
August, 1815.

KETCHUM  
v.  
EVERTSON.  
† 10 Johns.  
Rep. 266.

‡ *Gillet v. Maynard*, 5 Johns. Rep. 85.

§ *Cowp.* 565.

|| 1 *Comm on Contracts*, 252, 253. 5 *East* 148. 2 *Keb.* 136

[ \* 363 ]

ALBANY,  
August, 1816.

KETCHUM  
v.  
EVERTON

an action for the money they had advanced. The payment of the money received on the prior mortgage was for the benefit of *Rogers* and *Lambert*, and equivalent to a payment directly to them.

SPENCER, J., delivered the opinion of the Court. The plaintiffs seek to recover of the defendant 700 dollars, paid upon a contract for the conveyance of a farm; and it is contended, that the defendant has violated the contract in several respects: 1st. In this, that the deed executed by the defendant contains no covenants of warranty; 2d. That the defendant's wife has not executed and acknowledged the deed; and, 3d. That the boundaries specified in the deed do not embrace all the lands constituting the farm at the *Four Corners*.

It appears that the defendant executed a deed of the lands, included in a mortgage given by *Haight* to *Rogers* and *Lambert*, which deed was ready to be delivered at the office of *Rudd* and *Evertson*, in *Poughkeepsie*, on the first day of *May*, 1811; but the plaintiffs did not then, or on any subsequent day, receive the same, and perform the covenants which were simultaneously to be observed; the plaintiffs insisting on the preceding objections. It also appears, that the plaintiffs, who had taken possession of the farm contracted to be sold, abandoned the possession, and refused to perform their part of the contract; and that, subsequently, the defendant sold the same for a less sum than the plaintiffs had contracted to give. These are the material facts in the case, and I apprehend there is no ground for the plaintiffs' recovery.

The defendant stipulated to give a deed of the premises contracted to be sold to the plaintiffs; this covenant is fulfilled, by executing a conveyance of the property without warranty, or personal covenants. The case of *Van Eps v. The Corporation of Schenectady*, (12 Johns. Rep. 436.) decides this point. If other reasons were necessary to show the propriety of that decision, than those stated in that case, they at once suggest themselves; Courts of law can exact no more of parties than the performance of their contracts, according to the intention manifested by the terms used by them. When, therefore, it is agreed that a deed shall be given, nothing more can be exacted than an instrument sufficient to pass the estate of the party who is to give a deed. If it be required that the deed should contain covenants of warranty, nothing is more simple than the insertion of that stipulation in the contract. Courts are not to amend or alter the contracts of parties; and to construe an agreement to give a deed of a piece of land, to be also an agreement to insert a warranty, would be exacting more than the agreement specifies. A deed does not, *ex vi termini*, mean a deed with covenants of warranty, but only an instrument with apt terms conveying the property sold.

These observations equally apply to the second point. 'The  
300

defendant alone was to give a deed; the agreement is silent as to the defendant's wife uniting in the conveyance, and it would be an entire interpolation to say, that the defendant agreed that his wife should join in the deed. Had the agreement been, that the defendant should, by deed, vest the title to the lands sold in the plaintiffs, then the plaintiffs would have had a right, if the entire legal title was in the defendant, so that the wife might have been endowed of the land, in case of her survivorship, to insist on her joining in the deed. It is not necessary to say, that the defendant had such an estate, as that the wife might have been endowed, the agreement not giving rise to that question. The agreement evidently contemplates, that the deed to be given by the defendant shall be for the place called the *Four Corners*, as included in the mortgage given by *Haight to Rogers and Lambert*; a deed, then, adopting the boundaries and description in the mortgage, was a compliance with the contract; and it is admitted, that the deed executed was according to the mortgage.

The defendant, then, has complied with his agreement in all respects; and yet the plaintiffs, who have paid 700 dollars on the contract, and have totally refused to perform their part of the contract by accepting the deed, and giving a mortgage, seek to recover back the money thus paid, on the ground that the defendant has sold the farm, and thus rescinded the contract.

\*Where there is no agreement *subsisting* between the parties, but the same has been put an end to, by the election or refusal of the defendant to perform it, in general, the other party may recover back any money paid by him in part performance. This was so decided in *Raymond and others v. Bearnard*, (12 Johns. Rep. 274.)

It may be asserted, with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations, according to the contract, has never been suffered to recover for what has been thus advanced, or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have, themselves, rescinded the contract.

It would be an alarming doctrine, to hold, that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case; the plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subse-

ALBANY,  
August, 1816.

KETCHUM  
v.  
EVERETSON.

[ \* 365 ]

ALBANY,  
August, 1816.

WHEELER  
V.  
BAILEY.

quent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would, in effect, be saying, that the defendant could never sell it, without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfil it; it was in vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell; this would be most unreasonable and unjust, and is not sanctioned by any principle of law. There must be a new trial, with costs to abide the event of the suit.

New trial granted.

[ \* 366 ]

\*WHEELER *against* BAILEY.

Where, an officer having a defendant in execution, A. promised that if the officer would release the defendant, he would pay the amount of the execution if he failed to redeliver him to the officer on a certain day, and the officer accordingly released him; it was held, that this was a voluntary escape, and that the officer could maintain no action against A. on the non-performance of his promise.

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below against the plaintiff in error, and declared, for that he, the plaintiff below, as constable, had, in his custody, one *Charles Billings*, by virtue of two executions, and the defendant, in consideration that the plaintiff would release and discharge *Billings*, and that *Billings* would go to work for him, the defendant, promised the plaintiff that he would pay him the amount of the executions and costs, if he failed to deliver *Billings* into the custody of the plaintiff the next *Monday morning*; and the breach alleged was, that the defendant had failed in the performance of his promise. The allegations of the declaration were substantially made out in evidence on the trial; but there was no proof that the plaintiff below had paid the executions, or sustained any damage. A verdict and judgment were given for the plaintiff below, the defendant in error.

*Per Curiam.* The conduct of the constable, in permitting *Billings* to go at large, amounted to a voluntary escape, and he had no authority to take any security for the redelivery of *Billings* to him; the promise of the defendant was, therefore, void. Had it been an absolute engagement to pay the amount of the executions, it might have altered the case; but the undertaking of the defendant amounted only to his becoming security for the redelivery of *Billings* into his custody, a contract which the law would not justify his making; and it does not appear that he has sustained any damage whatever by the non-performance on the part of the defendant. The judgment must, accordingly, be reversed.

Judgment reversed.

**\*JACKSON, ex dem. KLOCK and others, against  
RICHTMYER. (a)**

ALBANY,  
August, 1816.

JACKSON

v.

RICHTMYER.

THIS was an action of ejectment, to recover part of lot No. 4, in the 6th allotment of a tract of land, in the town of *Minden*, and county of *Montgomery*; granted by letters patent, dated the 13th of *November*, 1731, to *Abraham Van Horne*, *William Prevost*, *Philip Livingston*, and *Mary Burnet*. The cause was tried before Mr. J. Platt, at the *Montgomery* circuit, in *August*, 1813.

At the trial, the plaintiff gave in evidence an exemplification of the letters patent to *Van Horne and others*, for 8,000 acres of land; also a release from *William Prevost*, one of the patentees, to *Philip Livingston*, another of the patentees, dated the 1st of *November*, 1734, of his undivided fourth part of the 8,000 acres, or tract described in the patent. *Philip Livingston*, by his will dated the 15th of *July*, 1748, devised his interest in the tract of 8,000 acres to *John Livingston and others*, who, by deed dated the 3d of *February*, 1761, conveyed to *George Klock* and *Jellis Fonda*, in fee, an undivided moiety of the land contained in the patent, except 1,000 acres conveyed to *David Schuyler*. The plaintiff further gave in evidence a deed from *David* and *Samuel Van Horne*, heirs at law of *Abraham Van Horne*, the patentee, dated the 3d of *February*, 1761, to *Jellis Fonda* and *George Klock*, of an undivided fourth part of the lands in the patent, except 500 acres conveyed to *David Schuyler*. It was admitted that *George Klock* died in 1787, and that the lessors of the plaintiff are his heirs at law; and that the defendant was in possession of part of lot No. 4, in the sixth allotment of the above-mentioned tract.

The defendant then gave in evidence a release dated the 22d of *November*, 1763, of the sixth allotment, from *Philip Livingston*, *William Livingston*, *Walter Rutherford*, *John Duncan*, and *William Burnet Brown*, styling themselves part owners of the land in the said patent, to three *Indians* and their heirs, in trust for themselves and all the rest of the native *Indians* belonging to the *Canajoharie Castle*, and their heirs forever. The defendant next gave in evidence a bill of discovery, filed in chancery by *John Lansing, jun.*, and others, including the present defendant, against the lessors of the plaintiffs, and their answers thereto. *Jacob G.* and *George G. Klock*, two of the lessors, in their answer, admit, that lands of certain *Indians* of the *Mohawk* tribe were included in the sixth allotment of the said patent, and that the *Indians* were greatly discontented on account of this grant; but they deny that their father, *George Klock*, at any time, ever assented to the release to those *Indians*, but re-

Where a partition was made in 1764, under the colonial act of 1762, and on the trial, in 1813, the map and field book which had been filed pursuant to the directions of that act, were produced in evidence, but the balloting book could not be found; it was held, that, after such a lapse of time, and the act of the parties recognizing the partition, it would not be in validated on account of the want of the balloting book. (b)

And an agreement relating to the partition, executed by a third person in the name of one of the parties, who it did not appear had any authority to execute it, was held to be ratified by the subsequent acts of the party in whose name it was made.

Where a person who recovers in an action

[ \* 368 ]

of ejectment takes possession, and conveys the land to a third person, for a valuable consideration, who enters, such entry and possession afford strong prima facie evidence of right. (c)

(a) This cause was decided in *May* term last, but was unavoidably omitted to be inserted among the cases of that term. See S. C. in error, 16 *Johns. Rep.* 314.

(b) Vide *Jackson v. Moore*, *infra*, 513.

(c) Vide 16 *Johns. Rep.* 325. 10 *Johns. Rep.* 338. 5 *Cowen's Rep.* 200. 7 *Cowen's Rep.* 637. 1 *Cowen's Rep.* 613.

ALBANY,  
August, 1816.

JACKSON  
v.  
RICHTMYER

fused to execute it. They admit, that proceedings, in partition, were had some time about the year 1764, and that *Isaac Vroman*, *Rynier Mynderse*, and *Joseph R. Yates*, were appointed commissioners for that purpose, who divided the tract into six allotments, and distinguished them numerically, and completed the map and field book on, or about the 9th of *October*, 1764. The defendants say that they are ignorant from what motives or opinions the commissioners acted, nor do they believe that any particular instructions were given by the proprietors of the patent, or by any of them, to the commissioners, to proceed to a subdivision of the sixth allotment, differing from those given for the partition of the other parts of the tract; but believe that they proceeded to a subdivision of the sixth allotment only from motives of duty. They admit that a draft of the lots into which the sixth allotment was subdivided, was duly made by the commissioners; and that, on such drawing, lot No. 1, in the said sixth allotment, was drawn to the share of the patentee, *Philip Livingston*; lot No. 2 to the share of the patentee, *Abraham Van Horne*; No. 3 to the share of the patentee, *Mary Burnet*; and No. 4 to the share of the other patentee, *William Prevost*. They deny that lot No. 1 was assigned to their ancestor, *George Klock*, as his full portion in the sixth allotment; but that, the opposition of the native *Indians* having ceased, *Jellis Fonda* and *George Klock* took possession of lot No. 1 as part of their share in the sixth allotment; and, in conformity to an adjustment between themselves, *George Klock* released to *Jellis Fonda* one fourth of lot No. 1, and *Fonda* released to *Klock* three fourths; and *Klock*, having possessed himself of lot No. 1, sold and conveyed his three fourths thereof to *Johannes Luke*. They admit, that the *Indians* continued on the land until 1779; and that, after they removed, some of the tenants, and others, residing on the lands, at the request of the defendants, entered \*into some agreements in writing for leases to be given whenever the defendants should obtain a patent for the land, or have their titles confirmed by the state; and they say that the reason of the last-mentioned stipulation in the agreement, was, because they were ignorant of the extent of their rights in the sixth allotment. They say that they have heard, but whether true or not they are unable to tell, that *Jellis Fonda* did obtain an instrument, or deed, (dated, as charged in the bill, the 6th of *July*, 1789,) from some of the *Indians* of the *Upper Mohawk Castle*, for the sixth allotment, which instrument they insist to be invalid. They admit that *Jellis Fonda*, and the following persons, to each of whom, as was charged in the bill, *Fonda* conveyed an undivided fifth part, *John Lansing, jun.*, *Abraham Van Vechten*, *Abraham G. Lansing*, and *Christopher P. Yates*, commenced actions of ejectment against them, and recovered possession, of which suits the defendants had notice, but judgment was obtained by default therein, by the negligence of the attorney. The defendants say, that they claim, in the ejectment

[ \* 369 ]



suits now pending, the half of lots No. 2 and 4, in the sixth allotment, and admit that their father, *George Klock*, was a party to the partition before mentioned. They state, that no part of the 1,000 acres excepted in the deed from the devisees of *Philip Livingston* to *Fonda* and *Klock*, and the 500 acres excepted in the deed from *Abraham Van Horne*, were contained in the sixth allotment. From the field book of the partition referred to in the answer, it appeared that the first, second, third, and fourth allotments, were subdivided into eight lots each, and the fifth and sixth allotments into four lots each; that, on the balloting, lots No. 1 and 2 of the first allotment, lots No. 1 and 8 of the second allotment, No. 1 and 5 in the third allotment, No. 1 and 3 in the fourth allotment, No. 3 in the fifth allotment, and No. 1 in the sixth allotment, fell to the share of *Philip Livingston*. Lots No. 3 and 7 in the first allotment, No. 3 and 4 in the second allotment, No. 2 and 3 in the third allotment, No. 2 and 6 in the fourth allotment, No. 2 in the fifth allotment, and No. 4 in the sixth allotment, fell to the share of *William Prevost*. Lots No. 4 and 8 in the first allotment, lots No. 1 and 2 in the second allotment, No. 6 and 8 in the third allotment, No. 4 and 7 in the fourth allotment, and No. 2 in the sixth allotment, fell to the share of *Abraham Van Horne*. Lots No. 5 and 6 in the first allotment, No. 5 and 6 in the second allotment, \*No. 4 and 7 in the third allotment, No. 5 and 8 in the fourth allotment, No. 4 in the 5th allotment, and No. 3 in the sixth allotment, fell to the share of *Mary Burnet*.

The answer in chancery of other of the lessors of the plaintiff, was read, containing the same allegations as the answer of *Jacob G.* and *George G. Klock*, and further insisting that there had been no subdivision of the sixth allotment, previous to the revolutionary war, except on paper, and that, subsequent to the war, only lot No. 1 had been run out, by actual survey.

The defendants gave in evidence a release from *George Klock* to *Jellis Fonda*, dated the 27th of *February*, 1767, by which he released to him his interest in certain lots in the patent, among which was lot No. 1 of the sixth allotment, describing the lands, as having been divided and laid into lots, in *September*, 1764, by *Isaac Vroman, esq.*, one of the commissioners appointed to make partition, as appeared by his map and field book, filed in the clerk's office of the county of *Albany*; also an agreement, dated the 26th of *January*, 1763, between *George Klock*, of the one part, and *John Duncan* and *Walter Rutherford*, of the other, that *Klock* should convey to *Duncan* and *Rutherford* one half of all his share in the *Canajoharie* patent, which he bought in company with *Jellis Fonda* at the same rate, and with the same warranty it was conveyed to him.

The defendant further gave in evidence the following agreement: "The proprietors in the *Canajoharie* patent having agreed to divide the said patent amongst them into patentees'

ALBANY,  
August, 1816.

JACKSON  
V.  
RICHTMYER

\* 370 ]

ALBANY.  
August, 1816.

JACKSON  
v.  
RICHTMYER.

[ \* 371 ]

shares, the following persons met at *New-York*, the 27th day of *November*, in the year 1764, to wit, *Jacob G. Klock*, in behalf of his father, *George Klock*, *Isaac Vroman*, in behalf of *Jellis Fonda*, the first holding three fourths, and the other one fourth of patentees' shares, *Philip Livingston*, who holds three eighths of a share, *Isaac Vroman*, for *John Duncan*, who holds five eighths of a share, *William Livingston*, who holds three eighths of a share, and *Walter Rutherford*, who holds five eighths of a share. They accordingly drew for the different shares, when *Philip Livingston* and *John Duncan* drew the patentee share that belonged to *Abraham Van Horne*; *William Livingston* and *Walter Rutherford*, the share that belonged to *W. Prevost*; and *George Klock* and *Jellis Fonda*, the share that belonged to *Philip Livingston*. They have, accordingly, \*agreed, that whatever lands shall be drawn by the commissioners to the patentee rights above mentioned shall belong to, and be the property of, the subscribers, in the shares above specified, and mutually agree to sign releases accordingly." This agreement was signed with the other parties by "*Jacob G. Klock* for *George Klock*."

The original map and field book of the partition were produced in evidence, and it was proved that neither the balloting book, nor any other papers relating to the partition, could be found in the proper offices. By the map and field book it appeared that partition of the tract was made by *Isaac Vroman*, *Rynier Mynderse*, and *Joseph R. Yates*, commissioners appointed by virtue of the act of the late colony of *New-York*, passed *January 3d*, 1762, and that the map and field book had been filed, as the law required, on the 9th of *October*, 1764, and that, by the partition, the tract was, pursuant to the directions of the act, divided into six allotments, and each of those allotments subdivided into four or eight lots, the sixth allotment being subdivided into four lots, each containing 850 acres, and numerically distinguished in such map and field book from one progressively; and that the whole of the tract was balloted for to the patentees named in the patent. It was thereupon admitted, on the part of the plaintiff, that No. 1 of the sixth allotment, was drawn as and for the share of *Philip Livingston*, and No. 3 of the same allotment, as and for the share of *Mary Burnet*, to which latter lot the plaintiff disclaimed all title; and also admitted that all the lots drawn on the ballot to the share of the patentee, *Philip Livingston*, were held under title derived from *Klock* and *Fonda*.

The defendant then gave in evidence a release from *William Burnet Brown*, describing him as the son and heir of *Mary Burnet*, to *Adam Garlock*, *Solomon Moyer*, and *John Pickard*, (who, or persons claiming under whom, still had possession,) dated 19th of *April*, 1765, for the lots drawn to the share of *Mary Burnet*, in the five first allotments; also, a partition deed between the last-named grantees, dated *October 24th*, 1766;

and a release from *John Duncan* and *Walter Rutherford*, to *Jellis Fonda*, dated the 28th of *June*, 1765, which recited that *George Klock* and *Jellis Fonda* were seised of an undivided sixth eighth part of the lands contained in the said patent, as tenants in common, and that *Jellis Fonda*, being so seised, conveyed an undivided moiety of his share to *Philip Livingston*, of the city of *New-York*, merchant, and *William Livingston*, of the same place, attorney at law, and the other moiety to *Walter Rutherford* and *John Duncan*; that partition of the tract was made in 1764, and that it was agreed, by the owners of the patent, or their attorneys, in the presence of the commissioners, before the allotment of the land, that the part and shares thereunder described for *Jellis Fonda* should fall in with the part and share of lots drawn for *Jellis Fonda* and *George Klock*, and then conveyed to the said *Jellis*, in fee, in his actual possession then being, by virtue of a bargain and sale, for one year, bearing date the preceding day, and by force of the statute of uses, one full third part of all that land conveyed to *Walter Rutherford* and *John Duncan*, by *Jellis Fonda*, lying partly in lots No. 1 and 2 of the first allotment, partly in lots No. 7 and 8 of the second allotment, partly in lots No. 1 and 5 of the third allotment, partly in lots No. 1 and 3 of the fourth allotment, and partly in lot No. 3 of the fifth allotment, all which lots were drawn in behalf of the said *Jellis Fonda* and *George Klock*.

The defendant also gave in evidence a contract under the hands and seals of *Jacob G. Klock*, one of the lessors of the plaintiff, and *Moses* and *Abraham Van Campen*, dated the 17th of *March*, 1788, by which the former agreed to sell the latter No. 1 of the fourth allotment of the said patent, in fee. Also, a conveyance, in fee, from *George Klock* to *Johannes Luke*, dated the 21st of *July*, 1784, for his three fourths of lot No. 1 in the fourth allotment. Also, a partition deed between *Jellis Fonda*, *John Lansing, jun.*, *Abraham G. Lansing*, *Christopher P. Yates*, and *Abraham Van Vechten*, of the whole sixth allotment, except lot No. 1, dated the 1st of *September*, 1790. Also, the will of *Jellis Fonda*, dated the 27th of *May*, 1791, empowering his executors to sell and convey his real estate; and a conveyance from the executors to the defendant and *John Richtmyer*, dated the 9th of *May*, 1792, for 100 acres of land released to *Fonda* in the sixth allotment, pursuant to the partition of 1790, being the premises in question. Also, two agreements executed by the lessors, *Jacob G. Klock* and *George G. Klock*, the one to *David A. Schuyler*, dated the 10th of *January*, 1791, and the other to *Robert Gardner*, dated the 29th of *September*, 1790, by which they promised to give leases of two parcels of land in the sixth allotment, when they should obtain a title or confirmation from the state.

\*Parol evidence was also offered by the defendant, further to show a possession, in conformity to the original partition of the

ALBANY,  
August, 1816.

JACKSON  
V.  
RICHTMYER.

[ \* 372 ]

[ \* 373 ]

ALBANY,  
August, 1816.

JACKSON  
v.  
RICHTMYER.

patent, and by the lessors of the plaintiff to show a possessory title in themselves. The jury, under the direction of the judge, found a verdict for the plaintiff, for three eighths of the premises, subject to the opinion of the Court, on a case containing the above facts.

The cause was argued by *Kirkland* and *Woodworth*, for the plaintiff, and by *Van Vechten* and *Henry*, for the defendant; but as the argument related principally to the evidence of title and possession, and the points are fully discussed in the judgment delivered by the Court, it is thought unnecessary to state the arguments of the counsel.

VAN NESS, J., delivered the opinion of the Court. The lessors of the plaintiff, having deduced a title to an undivided portion of the lands granted to *Van Horne* and others, by the letters patent of 1763, are entitled to recover, unless a valid partition has been made of these lands among the proprietors; and the principal question presented by the case is, whether sufficient evidence of such partition has been shown on the part of defendant. It seems to be admitted that a partition has been duly made of all the lands described in the letters patent, except those contained in the sixth allotment, comprehending the premises in question; but it is argued that this allotment is still to be considered as undivided. I am at a loss to discover any solid ground for this distinction. The partition was made under the colonial act of 1762, and all the proceedings to establish a perfect partition under that act have been produced, except the ballot book, which cannot, at this day, be found. From the proceedings that have been discovered, and which are set forth in the case, the commissioners, as well as the parties, evidently intended to divide the whole patent; and that they did so divide it, is expressly set forth in their field book and map; and there is not a single fact or circumstance, that I have been able to discover, showing that the sixth allotment was not as much the subject of partition as any of the other allotments. That allotment, as well as the other five, was laid out into lots, and, upon the balloting, No. 1 was drawn to the share of the patentee, *Philip Livingston*, No. 2, to that of *Abraham Van Horne*, No. 3, to that of *Mary Burnet*, and No. 4, (comprehending the premises in question) to that of *William Prevost*. After the commissioners had laid out the whole tract into six allotments, and subdivided the four first allotments into eight lots, and the remaining two into four lots, the parties to the partition met at the city of *New-York*, to proceed to a ballot pursuant to the act. By a written agreement between the proprietors, and the parties to the partition, on that occasion, dated the 27th of *November*, 1764, it appears that their respective interests were ascertained and settled as follows, to wit, *George Klock* and *Jellis Fonda* owned one of the patentees' shares, (*Klock* three fourths, and *Fonda* one fourth thereof,) *Philip*

[ \* 374 ]

*Livingston* three eighths of a share, *John Duncan* five eighths, *William Livingston* three eighths, *W. Rutherford* five eighths, making three fourths of the whole tract; *Mary Burnet*, or her heirs, holding the remaining fourth. The proprietors having agreed "to divide the said patent amongst them, into patentee shares, they accordingly drew for the different shares, when *Philip Livingston* and *John Duncan* drew the patentee share that belonged to *Abraham Van Horne*, *William Livingston* and *W. Rutherford* the share that belonged to *William Prevost*, and *George Klock* and *Jellis Fonda* the share that belonged to *Philip Livingston*; and they accordingly agree, that whatever lands shall be drawn by the commissioners to the patentee rights above mentioned, shall belong to and be the property of the subscribers" (to the said agreement) "in the shares above specified, and mutually agree to sign releases accordingly." It was objected to this agreement, in the course of the argument, that there was no evidence to show that *Jacob G. Klock* was authorized to sign the agreement in behalf of his father, *George Klock*. It is true there is no express evidence of this fact, but that he was duly empowered to represent his father, is most satisfactorily proved by his subsequent ratifications of this act, to which I will presently advert. By the map and field book duly filed pursuant to the colonial partition act, it appears, that "partition of the said tract of land, granted by the letters patent aforesaid, was made by *I. Vroman*, *R. Mynderse*, and *Joseph R. Yates*, commissioners appointed by virtue of the act of the late colony of *New-York*, passed the 3d of *January*, 1762, and that the said map and field book had been filed as the law required, on the 9th of *October*, 1764; and that, by the said partition, the said tract was, \*pursuant to the directions of the said act, divided into six allotments, and each of those allotments subdivided into four or eight lots, and the said sixth allotment, each containing 850 acres, and numerically distinguished in such map and field book from No. 1, progressively; and that the whole of the said tract was balloted for to the patentees named in the said letters patent." It further appears by the case that the plaintiff, at the trial, "admitted that lot No. 1, of the sixth allotment, was drawn as and for the share of the patentee, *Philip Livingston*, and lot No. 3, as and for the share of the patentee, *Mary Burnet*, to which latter lot the plaintiff disclaimed all title." It is thus clearly shown that a partition, in fact, was made of the whole tract contained in the letters patent; and that *George Klock* and *Jellis Fonda* owned, at the time, but one patentees' share, being one fourth of the whole tract; and I now proceed, as briefly as the subject will permit, to show that, whatever imperfection may exist in the evidence of a valid partition, under the colonial act, owing to the non-production of the ballot book, (if, indeed, any such imperfection exists,) it is amply supplied by the subsequent acts of the parties, and particularly by those of *George Klock*.

ALBANY,  
August, 1816.

JACKSON  
V.  
RICHTMYER.

\*375]

ALBANY,  
August, 1816.  
JACKSON  
V.  
RICHTMYER.

It was admitted at the trial, or is proved either by the answer to the bill in chancery, or by other written or oral testimony, 1st. That the lands in the first five allotments always have been, and still continue to be, held according to this partition.

2d. That *all* the lots drawn on the said ballot, to the share of the patentee, *Philip Livingston*, now are, and for a long time have been, held under a title derived from *George Klock* and *Jellis Fonda*.

3d. That *William Burnet Brown*, claiming to be heir at law of *Mary Burnet*, ratified the partition by selling and conveying to *Adam Garlock*, and others, in 1765, and within a few months after the partition was completed, "the lots drawn to the share of the patentee, *Mary Burnet*, in the aforesaid partition, in the five first allotments of said patent;" and that *Garlock* and his co-grantees, the following year, made partition of these lots among themselves, all of which have ever since been held under a title derived from *Garlock* and his associates.

[ \* 376 ]

4th. That, in *April*, 1766, *George Klock* and *Jellis Fonda* entered into a written agreement to divide all the lots drawn by them on the general partition, and in strict and exact conformity thereto. By this agreement, *George Klock* took, among other lots, precisely three fourths of lot No. 1, in the 6th allotment, and *Fonda* one fourth; and, at this time, no right or title to any other part of the sixth allotment was suggested or pretended, by *George Klock*; nor, indeed, was any such claim made until after the time the *Indians* left it.

5th. That, on the 27th of *February*, 1767, *George Klock* carried the last-mentioned agreement into effect, by releasing to *Fonda* his interest in the lots therein mentioned and designated; and describing the lands released as *having been divided and laid out into lots, in September, 1764, by Isaac Vroman, esq., one of the commissioners, and the surveyor appointed to make partition of the land contained in the patent of Van Horne and others, as appears by his map and field book, filed in the clerk's office, in the county of Albany.*

6th. That *George Klock*, in *July*, 1788, sold and conveyed three fourths of lot No. 1, in the sixth allotment, to *Johannes Luke*, under which deed it has been held ever since. These are some of the many unequivocal acts by which the partition of 1764 is recognized and ratified, not only by *George Klock*, but by others of the parties to it. Many more might be added, equally explicit and important, were it necessary. From those which have been adverted to, the authority of *Jacob G. Klock*, to sign his father's name to the agreement of *November*, 1767, is placed beyond all doubt. And it is equally clear, that *George Klock* not only admitted the validity of the partition of 1764, of the five first allotments, but, also, particularly that of the sixth allotment. A partition thus made, acted upon, and ratified, and under which rights have been acquired by purchasers, from the parties to it, ought not now to be disturbed. The Court is bound

to presume that every thing has been done, which was required to be done, to give it validity. The partition, then, being fully proved and established, the lessors of the plaintiff must fail, inasmuch as the defendant has shown a subsisting title to be out of them; and it is in this respect, chiefly, that the present case is distinguished from that of *Jackson, ex dem. Klock and another, v. Hudson*, (3 Johns. Rep. 375.)

The counsel for the plaintiff, however, claims, that the lessors of the plaintiff are entitled to recover upon their possessory title; and it, therefore, becomes necessary to say a few words in relation to that point. The possession which has been attempted \*to be shown, commenced some time after the revolutionary war. It was a mere naked entry, unaccompanied with any title, and, in fact, without the color of title. It may well be doubted, whether this possession was of such a nature as would have conferred any right, even if it had endured twenty years, upon those who took it, or whether it would have taken away any right from the true owner. Within twenty years, however, an action of ejectment was commenced against the persons then in possession, under some of the heirs of *George Klock*; and the lessors of the plaintiff, in that action, having obtained a judgment by default, turned the possessors out, and entered into possession under a *hab. fac. possessionem*. The defendant is a *bona fide* purchaser, for a valuable consideration, from the persons who thus obtained possession under that judgment. Although it is true, as was said by this Court in the case of *Jackson, ex dem. Wright and others, v. Deiffendorf & Zoller*, (3 Johns. Rep. 269.) that no right is definitively determined by a judgment in ejectment, yet it is equally true, that when a party enters under such a judgment, and then conveys to a third person for a valuable consideration, who enters under his deed, that such an entry and possession afford as high and solemn *prima facie* evidence of right as can well be exhibited; and higher and better evidence of title than the mere naked occupancy of these lands, indisputably belonging to other persons, by the representatives of *George Klock*. The lessors of the plaintiff, in their answer to the bill in chancery, do not put their right to recover upon the ground of possession. They rely, exclusively, upon the title which they claim to be vested in them, under the letters patent, and that title having failed, they are not entitled to recover at all.

SPENCER, J., having been formerly concerned for the lessors of the plaintiff, in a suit relative to the same title, did not sit to hear the argument, and gave no opinion in the cause.

Judgment for the defendant.

ALBANY,  
August, 1816.

JACKSON  
v.  
RICHTMYER

[ \* 377 ]

ALBANY,  
August, 1816.

SCOTT  
v.  
SHAW.

Where a defendant has been taken under a *ca. sa.*, and discharged from custody on the ground that no previous *fi. fa.* had been issued on the judgment, (there being special bail in the action,) the sheriff is, notwithstanding, entitled to poundage; as he has incurred the risk of being made liable for an escape, in an action for which he could not have availed himself of the irregularity as a defence. (c)

And it makes no difference that the defendant, after his discharge, confessed a new judgment to the plaintiff for the amount of the former judgment, on which satisfaction was entered, and that a *ca. sa.* having been regularly issued on the second judgment, the sheriff had been paid his poundage thereon.

[ \* 379 ]

\*SCOTT against SHAW.

IN this case, the question submitted to the Court, without argument, was, whether *Simon Fleet*, late sheriff of the city and county of *New-York*, was entitled to poundage on the *ca. sa.* issued in this cause, under the following circumstances:—

The plaintiff having recovered a judgment against the defendant in this cause, in which special bail had been filed, his attorney inadvertently issued a *ca. sa.*, when no *fi. fa.* had been previously issued and returned, pursuant to the proviso in the 7th section of the "Act concerning judgments and executions," (sess. 36. c. 50. 1 *N. R. L.* 502.) (a) The defendant, having been arrested on the *ca. sa.*, was, in consequence of the irregularity, discharged from custody, but without paying any fees. It being apprehended that the discharge might be deemed an extinguishment of the judgment, the defendant confessed a new judgment in favor of the plaintiff for precisely the same amount as the former one, and satisfaction of the first judgment was entered on record *pro forma*, but no payment or satisfaction was actually received, it being so expressed in the satisfaction piece, which was special. Upon this new judgment, a *fi. fa.* and *ca. sa.* were afterwards regularly issued, and upon the second *ca. sa.* the defendant was again arrested and taken into custody. The sheriff received his full poundage and other fees upon the second *ca. sa.*, and claimed poundage and other fees upon the first *ca. sa.*; his claim to caption and gaol fees was admitted, but the demand of poundage resisted.

SPENCER, J., delivered the opinion of the Court.

The act prohibiting the issuing a *ca. sa.* (1 *N. R. L.* 502.) (b) upon judgments rendered in actions wherein special bail has been filed, until after a *fi. fa.*, does not render a *ca. sa.* issued before a *fi. fa.* void; it is only voidable at the instance of the party against whom it is thus issued. The sheriff certainly incurred the risk of liability for an escape on the first *ca. sa.*, for he could not set up, in an action against him for an escape, that the *ca. sa.* had issued irregularly; the sheriff, therefore, gained a perfect title to his poundage, unaffected by the subsequent discharge of the prisoner. It is no answer to the sheriff's claim (c) for poundage, that he has received poundage upon another judgment between the same parties, and for the same original debt; it is, legally speaking, a new debt, as far as the sheriff is concerned. The allowance of poundage is for the risk incurred and that risk is in proportion to the amount of the sum to be levied, and as the sheriff was exposed to two risks, he is entitled to the poundage on both executions.

(a) 2 *R. S.* 363.

(b) 2 *R. S.* 363. 4.

(c) *Hinman v. Breeze*, *infra*, 529, acc. *Jones v. Cook*. 1 *Cowen*, 309.



ALBANY,  
August, 1816.A. K. PATTERSON *against* M. PATTERSON.PATTERSON  
v.  
PATTERSON.

A MOTION was made to set aside the report of referees in this cause. The plaintiff is a son of the defendant, and was born in 1773, and lived with and worked for his father, on his farm, until 1810; except that for one or two years during that time, he had the farm on shares. In 1805, or 1806, the defendant said he intended to reward the plaintiff well, that he was old, and that the plaintiff must continue with him as long as he lived, and he would reward him well, and that he should have the farm, paying legacies to his other children. In the autumn of 1810, the defendant tendered to the plaintiff 750 dollars, as a compensation for his services for 15 years, and requested him to sign a receipt, which the plaintiff declined doing, and did not take the money. One of the witnesses stated that, about five years ago, the defendant said he intended to give the plaintiff 750 dollars for his services, and had provided for it in his will, and that he should share equally with the other children. In his will, dated 22d of March, 1810, which was produced and proved before the referees, to be duly executed, it appeared that the defendant had ordered 750 dollars to be paid to the plaintiff; but if he should receive it after the date of the will, or before the testator's death, it was to be deemed a discharge of the bequest; and he gave all his real and personal estate to his wife for life, and, after her death, to his seven children, equally to be divided between them; and in a codicil to the will, he declared that the sum directed to be paid to the plaintiff was to be in full compensation for all his labor and services on the farm, since he came of age.

The plaintiff, after he had come of age, lived with and worked for his father, the defendant, who said he would reward him well, and provide for him in his will; held, that the plaintiff could not maintain an action to recover compensation for his services during the lifetime of his father.

\*VAN NESS, J., delivered the opinion of the Court. The plaintiff is entitled to a reward for his services, because the evidence repels the idea, that they were to be performed gratuitously. (*Jacobson v. The Executors of Le Grange*, 3 Johns. Rep. 200. *Le Sage v. Coussmaker and others*, 1 Esp. N. P. Rep. 187.) But from the testimony of John Patterson, as well as of several other witnesses, it is evident that the plaintiff was to be compensated for his services by a provision to be made for him, by his father, (the defendant,) in his will; and, of course, that no claim for compensation was to be made in his father's lifetime. The defendant is bound to make, and, it is to be presumed, will make, such a provision for the plaintiff by his will, as will do him perfect justice, and which may be perfectly satisfactory to him, or which, in judgment of law, may amount to a satisfaction. Should the defendant wholly overlook the plaintiff in his will, this would be such an act of injustice, that there can be no doubt the plaintiff might maintain an action, and recover a reasonable compensation for his services. This suit,

[\* 380]

ALBANY,  
August, 1816.

OVERSEERS OF  
TIOGA

v.

OVERSEERS OF  
SENECA.

however, is premature, and cannot be supported. The report of the referees must, therefore, be set aside.

Motion granted.

BROOKS AND ANOTHER, Overseers of the Poor of the Town of TIOGA, *against* READ AND ANOTHER, Overseers of the Poor of the Town of SENECA.

A. B., a pauper, was removed, by an [ \* 381 ]

order of two justices, from the town of T. to the town of S. On appeal, the order was quashed, and the overseers of T. directed to pay a sum of money to the overseers of S. on account of the expenses of the pauper, intermediate between the time of the removal and quashing the order. At the time the order was quashed, the pauper could not, by reason of ill health, be reconveyed to T., but was supported, for some time thereafter, at the expense of the overseers of S. Held, that the overseers of S. could not maintain an action of *assumpsit* against the overseers of T. to recover the amount of those subsequent expenses, there being no previous request, or express promise to pay them; and admitting that a moral obligation would be a good consideration for an implied promise, here was no moral obligation on the part of the overseers of T., as it did not appear that the pauper was legally settled in T.; for the order of sessions quashing the original order of removal, does not prove that the pauper was settled in T., but only that he was not settled in S. (a)

Whether the provision of the act for the relief and settlement of the poor, (sess. 36. c. 78. s. 15.) giving a summary remedy to the overseers of the poor of one town, who have supported a pauper of another town, who, by reason of sickness, could not be removed, against the overseers of that other town, is cumulative, or takes away the common law remedy? *Quere.*

Whether, if A. B. had had no legal settlement in this state, the overseers of S. could have maintained an action against the overseers of T. for the expenses incurred subsequently to quashing the order of removal. *Quere.*

Whether a moral obligation will support an action on an implied *assumpsit*? *Quere. (b)*

(a) Vide *Pittstown v. Plattsburg*, 15 Johns. Rep. 436. S. C. 19 Johns. Rep. 407  
(b) Vide *Bartholemew v. Jackson*, 20 Johns. Rep. 28.

proved, on the part of the plaintiffs, in the Court below, that *AP Phee* was, at the time of the reversal of the order of removal, in such a state of health that he could not be taken back to *Tioga*; and that, from the 5th day of *May*, 1813, when the order of removal was quashed, to the 20th of *September*, 1814, when he was conveyed to *Tioga*, the plaintiffs below had expended the sum of 199 dollars and 23 cents for his maintenance, and that they had also paid 24 dollars for removing him to *Tioga*. A witness on the part of the plaintiffs below proved that, in *June*, 1813, he went, at the request of the then overseers of *Tioga*, to the town of *Seneca*, for the purpose of receiving the pauper; but that, being so ill that he could not be removed on horseback, the only means of conveyance with which the witness had been furnished, the witness refused to take him, and left him in the charge of the overseers of *Seneca*, as before. The plaintiffs below having rested their cause, the defendants \*moved for a nonsuit, which was overruled; they then offered to give evidence of certain facts, (which it is unnecessary to state,) but the Court rejected the testimony, and a verdict and judgment were given for the plaintiffs below. The defendants below, the present plaintiffs in error, tendered a bill of exceptions to the opinion of the Court below, which was removed into this Court by writ of error. The cause was submitted without argument.

ALBANY,  
August, 1816.  
OVERSEERS OF  
TIOGA  
V.  
OVERSEERS OF  
SENECA.

[\* : 82]

SPENCER, J. delivered the opinion of the Court. If it be admitted at all, it must be with great hesitation, that, if even the pauper's legal settlement was in *Tioga*, the maintenance of him by *Seneca*, without the request, and without any promise by the overseers of the poor of *Tioga*, will give them a right to maintain an action of assumpsit. The cases of *Simmons v. Wilmot*, (3 *Esp. Rep.* 91.) and of *Wenall v. Adney*, (3 *Bos. & Pull.* 247.) certainly favor the idea, that, in such a case, an action of assumpsit could be maintained, on the implied promise resulting from the legal and moral obligation, on the part of the town where the pauper is legally settled, to provide for and maintain him. The case of *Atkins and another v. Banwell and another*, (2 *East*, 505.) is directly to the contrary; in that case, Lord *Ellenborough* held, that though a moral obligation was a good consideration for an express promise, it had never been carried farther, so as to raise an implied promise in law, and he said there was no precedent, principle, or color, for maintaining the action.

But, in the present case, there is no proof that the pauper was legally and rightfully settled in the town of *Tioga*; the legal presumption is against the fact; for the order appealed from, adjudicated the pauper's settlement to be in the town of *Seneca*, declaring it not to be in *Tioga*. The subsequent reversal of that order, proves only that the settlement was not in *Seneca*, and *Tioga* has been subjected to all the consequences provided

ALBANY,  
August, 1816.  
THE PEOPLE  
v.  
BERNER.

[ \* 353 ]

by the act for making the order, by being adjudged to pay the costs, and the expenses incurred in providing for the pauper, intermediate the order and the reversal of it by the sessions.

The act (1 N. R. L. 284.) (a) has provided for such a case. It authorizes overseers of the poor of a town, where a pauper is taken sick, so as to be incapable of being removed, to give notice to the overseers of the poor of the town where he is legally \*settled, of the name, condition, and circumstances, of such poor person, requiring them to take care of, &c., such poor person; and, in case of neglect, it gives a summary process to levy all sums of money necessarily expended in his maintenance.

I will not say, that this is not a cumulative remedy, or that it takes away a common law right to maintain an action of assumpsit for the expenses incurred. But, in the present case, if the objection could be surmounted, that here this is no promise, on the part of *Tioga*, to pay these expenses, nor request to keep the pauper, the foundation of the action fails; there appears to be no moral obligation arising from the pauper's settlement in *Tioga*, because the fact does not appear to be so.

It may be said, that *Tioga* was the cause of the expense incurred by *Seneca*, in this, that the pauper was illegally imposed on *Seneca*, and it was bound to provide for him to prevent his perishing. *Tioga* has paid the penalty of that act, by being subjected to the charges of maintaining the pauper between the time of making the order and its reversal, and the costs therein. I give no opinion, whether an action on the case could not be maintained, by the overseers of *Seneca* against the overseers of *Tioga*, for these subsequent expenses, provided it should appear that the pauper had no legal settlement within this state; that would present a different question. This action, under the circumstances of the case, is not maintainable.

Judgment reversed

(a) Vide 1 R. S. 625.

### THE PEOPLE against BERNER, BORST, and others.

The negligence of the creditor in calling upon the principal, does not exonerate the surety, unless he has been damaged by such negligence.

THIS was an action of debt on a bond executed by the defendants, to the people of the state of *New-York*, dated the 8th of *June*, 1808, in the penal sum of 24,936 dollars, and conditioned that *Hermanus Bouck* and *Jeremiah Brown*, two of the

In an action against the sureties of the commissioners, for loaning money of the county of *S.*, for the default of their principals in not paying over money which they had received for interest, it was held, that the sureties were not exonerated by the negligence of the comptroller in not calling upon their principals after numerous defaults, unless an injury resulted to them from his negligence. (a)

(a) Vide *The People v. Russell*, 4 *Wendell's Rep.* 570. *Niblo v. Clark*, 3 *Ibid.* 24. *Andrus v. Bealls*, 9 *Cow. Rep.* 693. See also the cases cited in the notes to *Pain v. Packard*, *supra*, 174, and the case of *The People v. Jansen*, 1 *Johns. Rep.* 332, note (a).

defendants, should well and truly perform the office and duty of commissioners for loaning money for the county of Schoharie. The breach assigned was, that, on the 1st of *June*, 1814, the \*defendants *Bouck* and *Brown* had in their hands 3,119 dollars and 33 cents, which they had received for interest, and which they had neglected and refused to pay over to the plaintiffs. The defendants *Berner* and *Borst* pleaded, 1. *Non est factum*. 2. That *Bouck* and *Brown* had not received the above-mentioned sum, and that they had paid into the treasury all the moneys which had come to their hands, for interest, according to the directions of the act. The issues joined between the plaintiffs and the defendants *Berner* and *Borst*, were tried before Mr. J. *Yates*, at the *Albany* circuit, in *October*, 1815.

It was proved, that, on the 1st of *July*, 1814, there was a balance due to the state for interest, received by the defendants *Bouck* and *Brown*, of 3,119 dollars. No suit, other than the present, had been commenced for default of the first, or of any subsequent payments, nor had any notice been given by the comptroller to the sureties of any such defaults. A verdict was taken for the plaintiffs for the above-mentioned sum, with interest, subject to the opinion of the Court on the above case, which was submitted to the Court without argument.

*Per Curiam.* The defence set up by the defendants *Berner* and *Borst*, cannot prevail. The principles adopted by this Court, in the case of *The People v. Jansen*, (7 *Johns. Rep.* 332.) do not apply here. Although there may have been negligence on the part of the public officers, in omitting to call these commissioners to account sooner, that omission, from any thing that appears, has not, in any manner, prejudiced the security. There must not only be negligence on the part of the creditor, but an injury resulting therefrom to the security, in order to exonerate them. It does not appear that the commissioners are insolvent, or unable completely to indemnify, and save harmless, their security. Independently of this circumstance, however, the situation of these commissioners is not analogous to that of loan officers. There is no board whose duty it is annually to inspect and pass their accounts. The general duties of the commissioners, and of the comptroller, are pointed out. But it is not made the duty of the comptroller to report to the governor, or any other person, the deficiency of the commissioners. The judgment must, accordingly, be entered for the plaintiffs.

Judgment for the plaintiffs.

ALBANY,  
August, 1816.  
THE PEOPLE  
v.  
BERNER.  
[\* 384]

ALBANY,  
August, 1816.

MATTER OF  
BRADSTREET.

\*In the Matter of BRADSTREET, an insolvent debtor.

When an order has been made for the assignment of an insolvent's estate, under the 9th section of the insolvent act, (1 N. R. L. 464.) the officer granting the order cannot afterwards vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party.

Where the counsel for the opposing creditors was, while going to the office of the recorder of New-York to oppose the insolvent's discharge, met by one of the attorneys for the petitioning creditors and insolvent, and detained by him in conversation and the perusal of papers relating to the opposition, and in the mean time the other attorney had appeared with the petitioning creditors before the recorder, and obtained an order for the assignment of the insolvent's estate, it was held, that under these circumstances the recorder ought to vacate the order. (a)

The officer before whom the proceedings under the 9th section of the insolvent act are had, should be satisfied that two thirds of the creditors had requested that an assignment of the insolvent's estate should be made; although if it appear, after the assignment has been made, that two thirds of the creditors had not assented, the assignment is, notwithstanding, valid.

If the creditors do not attend in due time to oppose, their assent is presumed, and that they have waived their opposition.

The assignment having been made by the insolvent himself, under the 9th section of the insolvent act, he is to be discharged, on conforming with the directions of the act, in respect to petitioning creditors; he must therefore make out, under oath, an account of his creditors, and a just and true inventory of his estate, and deliver over his estate to his assignees; but he is not bound to advertise anew.

THE following facts were submitted by the parties to the Court for their opinion, and were to be considered in the nature of a return to an alternative *mandamus* directed to the recorder of New-York, requiring him to sign the insolvent's discharge, or show cause to the contrary.

On the 23d December, 1815, one of the creditors of the insolvent applied to the recorder, under the 9th section of the insolvent act, to compel the insolvent to assign his property for the benefit of all his creditors. Regular notice having been given, such of the creditors as appeared before the recorder, at the time appointed by the notice, proved their debts, and requested an assignment. The order to assign was made, and in a few minutes thereafter, certain opposing creditors appeared, and applied to have the order vacated. The following facts are stated in the affidavit of Mr. *M' Coun*, who acted as counsel for the opposing creditors. The deponent received a letter from *Boston*, enclosing certain affidavits to oppose the insolvent's discharge. On the morning of the 27th February, 1816, at the time appointed for the creditors to appear, while going to the recorder's office, he was met by Mr. *Fay*, one of the attorneys for the petitioning creditors and insolvent, who requested the deponent to stop and let him look at the affidavits before submitting them to the recorder, at the same time observing, that perhaps some arrangement might be made to satisfy the creditors. The deponent thereupon showed him the affidavits, and read him part of the letter accompanying them, and *Fay* consented to adjourn the business until the Monday following. The deponent then proceeded with *Fay* to the recorder's office, where they were informed by the recorder, that he had just granted Mr. *Van Wyck* (the other attorney for the petitioning creditors and insolvent) an order for the assignment of the insolvent's estate. *Fay* then expressly admitted, that he had detained the deponent, and that, but for his detention, the deponent would have been in time to make his opposition, and declared that there should be no difficulty about it, and that he would go after Mr. *Van Wyck*. Shortly after, *Fay* and *Van Wyck* returned to the recorder's office, and, after some conversation, they agreed, as the deponent understood, to open the

(a) Vide *Underwood v. Erving*, 3 Conn. Rep. 59.

ALBANY,  
August, 1816.MATTER OF  
BRADSTREET


case, and then proceeded to object to the affidavits that they were not made before a proper magistrate. The recorder, to give the deponent an opportunity to show that they were properly taken, adjourned the proceedings until the next day, when the deponent having shown, to the satisfaction of the recorder, that they were taken before a competent magistrate, *Fay* and *Van Wyck* objected that they were not certified under the seal of the magistrate; upon which the recorder intimated, that, if that were a good objection, he would be willing to allow further time to have the affidavits properly certified; whereupon *Van Wyck* declared, that, if such were to be the case, he would not consent to give up the order of assignment which he had obtained; and there was, accordingly, an end to all further discussion before the recorder. The next day, *Fay* met the deponent, and, denying that there had been any collusion between him and *Van Wyck*, told the deponent that he had determined that the order should be vacated, and the case opened for a hearing, and that he had prevailed upon *Van Wyck* to consent: soon after, the deponent saw *Van Wyck*, who told him that he would consent to submit the case to the recorder, when Mr. *Sedgwick* (on whose behalf the deponent had acted in this affair) should return, and let him decide whether he would open it or not. To this the deponent replied, that such a submission of the case would be of no avail, as the recorder had already said that he could not open the case for a hearing, unless they would consent to give up the order absolutely; and that it was the deponent's wish, and was the only way in which, in his opinion, the business could be conducted, to submit the case to the recorder in the same manner as if no order had been made. *Van Wyck* replied, to the best of the deponent's recollection, "Very well, we will do so; and we will let the business rest until Mr. *Sedgwick's* return: in the mean time, if any assignment is made by the insolvent, it shall be conditional." From these conversations with *Fay* and *Van Wyck*, the deponent understood that they \*had consented to give up and vacate the order of assignment, and open the case for a rehearing.

[ \* 387 ]

To the case was annexed a paper signed by Mr. *Fay*, in which he stated that he desired that the order might be vacated, and that the opposing creditors might be allowed to come in; "it being nevertheless hereby expressly declared, that the petitioning creditors, and the insolvent, since the conversation at the recorder's office aforesaid, have objected, and now object, to vacating such order, and to the coming in of the creditors."

The case was argued at the last term, by *R. Sedgwick*, for the opposing creditors, and *T. A. Emmet*, for the insolvent.

THOMPSON, Ch. J., now delivered the opinion of the Court. The counsel, in the argument of the case, have made two questions for the consideration of the Court. The first relates, particularly, to this case, to wit, whether the recorder, under the

ALBANY,  
August, 1816.  
  
MATTER OF  
BRADSTREET.

circumstances stated, has the power, and ought to vacate the order for assignment made by him. The second is a more general question, involving the construction of the 9th section of the insolvent act, (1 *N. R. L.* 464.) concerning which a diversity of opinion, as well as practice, has prevailed.

With respect to the first question, it is unnecessary to decide, whether the recorder, after having made an order for the assignment, would have a right to vacate it, when there was no surprise upon opposing creditors, or any circumstances attending the proceedings calculated to mislead them; I am inclined to think, however, he could not. But a recurrence to the particular circumstances disclosed in this case shows very clearly, that the counsel for the opposing creditors was prevented from making opposition to the order for assignment, by the conduct of the counsel for the insolvent; whether it was by design or not, is unnecessary to say. The willingness of the counsel, to have the order vacated, would seem very strongly to counteract any unfavorable conclusions from such conduct. We have no hesitation, however, in saying, that the recorder, under the circumstances disclosed to him, had the power, and it was his duty, to have vacated the order. The decision of this point puts an end to the present case, as it opens the proceedings to \*let in the creditors to oppose the assignment. The other question made on the argument might not arise. But, for the purpose of settling the construction to be given to this section of the act, and of having a conformity in the proceedings under it, it has been thought proper to express an opinion upon the other question also.

[ \* 388 ]

This section applies to the case of an adversary proceeding against the insolvent, founded upon the supposition that he is wasting his property; but there is too much reason to believe, that the proceedings, under this section, are commenced and carried on at the instance of the insolvent, calculating upon the inattention of his creditors, and that he may procure his discharge without obtaining the assent of creditors, whose debts amount to two thirds of all the debts owing by the insolvent, and thus evade what is the clear and manifest policy of the statute. The point immediately in controversy, is the meaning of that part of the section which declares, that, if the insolvent shall make such assignment in ten days, "and shall conform to the directions of this act, with respect to petitioning debtors, such insolvent shall be thereupon discharged, in like manner as if he had petitioned for his discharge, in conjunction with the creditors, pursuant to this act." The insolvent is supposed to have made the assignment; and what else he has to do, is the question. The clause refers to his duties in other parts of the act, and requires of him to conform to its directions with respect to petitioning creditors. This, however, in good sense and sound interpretation, must be understood as extending only to such things as have not already been done. He is not, therefore,



ALBANY,  
August, 1816.  
MATTER OF  
BRADSTREET.

bound to advertise anew. That has been done. And, under this section, before any order is made for the assignment, the judge, or officer before whom the proceedings are had, must be satisfied that two thirds of his creditors have requested an assignment to be made. A notice for the purpose of the creditors appearing to assent to, or oppose, such assignment, having been given, the law presumes that the creditors have appeared, or have waived any opposition to the assignment. We must assume, therefore, that two thirds of the creditors have actually appeared and requested the assignment, and made the necessary affidavit; and, of course, nothing more is to be done by the creditors. As yet, the proceedings are presumed to have been hostile to the wishes of the insolvent, and if he \*still holds out, the officer before whom the proceedings are had is directed to make the assignment. The insolvent, however, in such case, is not discharged from imprisonment, or from his debts. But if the insolvent, in this stage of the proceedings, chooses to step in and make the assignment himself, and conforms, as above stated, he is discharged, both from imprisonment and from his debts; and this conformity, I apprehend, must be by making out an account of his creditors, and a just and true inventory of his estate, and delivering over his estate to his assignees. These are acts which the statute prescribes to be done by the insolvent, and which have not been done, or presumed to have been done, by any proceedings which have as yet taken place under this section of the act. This inventory and account ought to be rendered under oath. The proceedings are founded upon the allegation or apprehension that the insolvent is wasting or embezzling his property; and if willing to repel this by truly and honestly giving up his estate, he is entitled to his discharge. An account of his creditors ought to be given, that the assignees may know who are entitled to dividends. By such account of the creditors, and the debts owing to them, it will, probably, in most cases, appear, that less than two thirds, in amount, have requested the assignment to be made. But this cannot defeat the discharge: the creditors should have appeared pursuant to the notice; and, after the order for the assignment is duly made, it is too late to call that matter in question. I am aware that this mode of proceeding is liable to very great abuse, by the insolvent's procuring one of his creditors to proceed against him under this section of the act, and by the negligence of creditors in not appearing pursuant to such notice. But most of this abuse, or fraud, grows out of the inattention of creditors; and the officer before whom the proceedings are had, might, perhaps, if he suspected, or had any evidence of collusion, take measures to guard against it. He must be satisfied that creditors to two thirds in amount of the insolvent's debts do request the assignment to be made. If creditors will not appear in due time, and make opposition, if any they have, they have themselves only to blame. The proceedings under

[ \* 389 ]

ALBANY,  
August, 1816.

WEBB  
v.  
DUCKING-  
FIELD.  
[ \* 390 ]

this section of the act are, perhaps, not so well guarded to prevent fraud as might be desirable; but we must give a construction to the act as we find it; and the one I have mentioned seems to be most conformable to its letter and \*intention. I am, accordingly, of opinion, that, in proceedings under this section of the act, after the order for the assignment is duly made, and the assignment executed, the insolvent is entitled to his discharge, upon making out, upon oath, a true inventory of his estate, and account of his creditors; notwithstanding it may appear, by such account, that two thirds of his creditors have not requested the assignment to be made; and this is the construction adopted by the Court.

### WEBB against DUCKINGFIELD.

Where a seaman who had signed shipping articles, by which he engaged not to absent himself from the vessel, without leave, "until the voyage was ended, and the vessel discharged of her cargo," on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain and assist in discharging the cargo, but absented himself without leave; it was held, that, by such desertion, he had forfeited his wages. (a)

Though the master has no right to insert in the shipping articles any stipulation, or agree-

[ \* 391 ]

ment, repugnant to the laws of the United States, yet he may add any provisions consistent with the laws relative to seamen.

IN ERROR, on *certiorari* to the Justices' Court of the city of New-York.

*Duckingfield* brought an action in the Court below against *Webb*, to recover his wages as a seaman on board of the ketch *Maria*, of which *Webb* was master, on a voyage "from Savannah to Rotterdam, or one more port in Europe, and from thence to her port of discharge in the United States." The plaintiff below performed his duty on board the vessel during the voyage, and until she arrived in New-York, her last port of discharge, and was safely moored in port, when he left her, refusing to remain on board, or to assist in discharging the cargo, though he and the rest of the crew were requested to remain. The plaintiff below never returned to the vessel, and the master was obliged to hire persons to discharge the cargo. The mate, on the day the plaintiff below left the vessel, and on each day until the cargo was discharged, made the following entry in the log-book: "All the crew absent without liberty." The Court below being of opinion, that, as the voyage was ended by the arrival and safe mooring of the vessel in her port of discharge, the plaintiff below could not be deemed a deserter, so as to incur a forfeiture of his wages; and further, that, to create a forfeiture, the name of the particular seaman who was absent without leave must be entered in the log-book; and they, therefore, gave judgment for the plaintiff below, for 180 dollars, being the amount of wages due to him on the day he left the vessel. The articles signed by the parties contained the following \*clauses: "The said seamen severally promise, &c., not to neglect or refuse doing duty by day or night, nor shall go out of the said vessel, &c., until the said voyage be ended, and the vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board." "That no officer or

(a) See the cases cited in *M'Millan v. Vanderlip*, 12 Johns. Rep. 165, note (a), and in *Jennings v. Camp*, supra, 94, note (b).

seaman, belonging to the said vessel, shall demand, or be entitled to, his wages, or any part thereof, until the arrival of the said vessel at her above-mentioned port of discharge, and her cargo delivered." "Provided, nevertheless, that if any of the said crew disobey the orders of the said master, or other officer of the said vessel, or absent himself, at any time, without liberty, his wages, due at the time of such disobedience or absence, shall be forfeited, and in case such person or persons, so forfeiting wages, shall be reinstated, or permitted to do further duty, it shall not do away such forfeiture."

ALBANY,  
August, 1816.

WEER  
v.  
DUCKING-  
FIELD.

*Antho*n, for the plaintiff in error.

*Van Wyck*, contra.

VAN NESS, J., delivered the opinion of the Court. All the seamen belonging to the ship, whose last port of delivery was *New-York*, deserted her at that place, as soon as she was moored, and refused to assist in unloading the cargo; and the question is, Can they recover their wages up to the time of the desertion, or not? The determination of this question has nothing to do with the mate's making an entry in the log-book of the desertion. Such entry, if it had been made, would have been *prima facie* evidence of that fact; but, as it is fully proved by the other testimony, that is sufficient, without the log-book. The reasons for making these entries in the log-book are accurately stated by Judge *Peters*, (vol. 1. of his *Adm. Dec.* 139.) and have no application to this cause. By the 6th section of the act of congress for the government and regulation of seamen in the merchants' service, (1 *L. U. S.* 140.) it is enacted, "that, as soon as the voyage is ended, and the cargo, or ballast, be fully discharged at the last port of delivery, every seaman, or mariner, shall be entitled to the wages which shall be then due, according to his contract," &c. From this, as well as the reason and propriety of the thing, the contract with a seaman continues in force until the cargo is finally discharged, and, if \*he leaves the ship without justifiable cause, before that is accomplished, he has no right to recover any part of his wages. The shipping articles contain an express stipulation by which the wages are forfeited, in this case, in the very event which has happened; but the counsel for the seamen supposes this stipulation to be illegal, because it forms no part of what is provided shall be contained in the contract between the master and crew, by the 1st and 2d sections of the act before referred to. The master has no right to insert any stipulation, or agreement, repugnant to, or inconsistent with, the statute; but there can be no objection to superadding any provisions harmonizing with it. Such is the provision in question, which only follows the 6th section of the act, which may be considered as a legislative definition of what shall be deemed to be the termination of a voyage, so as to entitle the seamen to their wages. The

[\*392]

ALBANY,  
August, 1816.  
CUNNINGHAM  
v.  
SPIER.

principle upon which the two cases of *M'Millan and another v. Vanderlip*, (12 Johns. Rep. 166.) and *Jennings v. Camp*, (13 Johns. Rep. 94.) were decided, is strictly applicable to this case. The judgment below must be reversed.

Judgment reversed

### CUNNINGHAM against SPIER.

Where *A.* transferred to *B.* stock in a turnpike company, which, at the time of the transfer, appeared, by the books of the company, to have been fully paid up by a credit of interest [\* 393] on the amount before paid in, pursuant to a resolution of the directors, and this resolution was, after the transfer, repealed, and the stockholders called upon to pay in the amount before allowed for interest, in consequence of which *B.* paid to the company that sum on the shares transferred to him by *A.*, it was held that *B.* could not maintain an action to recover the amount from *A.*, there being neither fraud or a warranty.

THIS was an action of assumpsit for money paid. The cause was tried before Mr. J. Platt, at the *New-York* sittings, in *December*, 1815.

The plaintiff gave in evidence a receipt signed by the defendant, which was in the following words:—"Received, *New-York*, 18th of *April*, 1807, of Mr. *William Cunningham*, in cash and notes, five thousand and seventy-five dollars, in full for one hundred and forty-five shares in the *Newburgh* and *Cochecton* turnpike road. Paid thirty-five dollars for each share."

\*At a meeting of the directors of the *Newburgh* and *Cochecton* turnpike company, on the 12th of *December*, 1803, it was resolved, "that the treasurer place to the credit of each stockholder the interest, at 14 per cent., of all money by them advanced to the company, up to the first day of *January*, 1804, and that the said interest be cast, and placed to each person's credit every six months thereafter." This resolution was rescinded on the 26th of *December*, 1804, and revived again by a resolution of the 14th of *May*, 1805; and on the 13th of *September*, 1806, it was resolved, "that the half-yearly dividend of interest should in future be credited to the holders at the expiration of the half year." This last resolution was, by a resolution of the 17th of *January*, 1807, discontinued from the preceding 1st of *January*; and on the 2d *July*, 1808, it was resolved, "that whereas, by a resolution of a former board of the directors of the *Newburgh* and *Cochecton* turnpike road company, a dividend of 14 per cent., upon the capital stock of each stockholder, was allowed and deducted from the money due by them to said company on said stock, and whereas, by an act entitled an act to prevent usury, it is unlawful for any person to take more than 7 per cent. per annum, and whereas, by an act entitled an act to establish a turnpike company for making and improving a road from the village of *Newburgh*, on the *Hudson* river, to *Cochecton*, on the *Delaware*, a dividend of 14 per cent. is in no case allowed excepting from the clear profit and income of said road. Thereupon, resolved, that said resolution is contrary to an exception contained in the 2d section of said act, which provides, that the president and directors of said company shall make no laws inconsistent with the constitution and laws of this state, and that it now is, and always had been, void, and of no effect. Resolved, that the treasurer be authorized to

ask, and demand, of and from every stockholder, all moneys or stock yet due by them to the company, agreeably to the above resolve for rescinding the resolution, allowing credits on said stock, by 14 per cent. anticipated interest."

It was proved that the stock mentioned in the receipt from the defendant to the plaintiff, consisted of 130 shares, which stood in the books of the company, in the name of the defendant, and 15 shares, which stood in the name of one *Lockwood*, \*and were sold by the defendant, and which were charged to the plaintiff, in the books of the company, at 35 dollars per share. After the sale by the defendant to the plaintiff, there was a balance due from the plaintiff to the company, of 1,388 dollars and 6 cents, part of which, 1,181 dollars 20 cents, had been credited to the defendant on his shares, prior to the sale to the plaintiff, under the resolution of the company directing the treasurer to place to the credit of each stockholder the interest, at 14 per cent., of all moneys therein advanced to the company. In consequence of the resolution of the 2d of *July*, 1808, the treasurer of the company called upon the plaintiff to pay the sum of 1,388 dollars and 6 cents, or otherwise the shares would become forfeited; the defendant gave his notes for this sum, which were paid as they became due; to recover part of which, to wit, 1,181 dollars 20 cents, the present action was brought, the residue of the above-mentioned balance being on account of other transactions between the plaintiff and the company. It was proved by *George Monell*, who was treasurer of the company, at the time of the transfer from the defendant to the plaintiff, that he had informed the plaintiff of the manner in which the defendant's stock account had been paid up and settled, which was by his being credited with 14 per cent., pursuant to the resolution which was afterwards rescinded: by the books of the company, as they stood at that time, the account of the defendant for stock appeared to have been fully paid up.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the Court on a cause containing the above facts.

*D. B. Ogden*, and *Wilkins*, for the plaintiff.

*Wells*, and *Slosson*, contra.

*Per Curiam.* There is no ground upon which this action can be sustained. The defendant cannot be charged with any fraudulent misrepresentation with respect to the value of the stock. The receipt given by him, to the plaintiff, for the money, is fairly to be understood as stating that thirty-five dollars had been paid upon each share. But the manner in which this payment had been made was known to the plaintiff before he purchased the stock, according to the testimony of *Monell*, who swears that he informed the plaintiff how the stock account of \*the defendant was settled up and paid, by the allowance of fourteen per cent. upon the money paid in; and by the books

ALBANY,  
August, 1816.  
CUNNINGHAM  
V.  
SPIER.

[ \* 394 ]

[ \* 395 ]

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN.

of the company the defendant stood credited with 35 dollars paid upon each share. If the plaintiff was, therefore, acquainted with the situation of this stock, and the manner in which the 35 dollars had been paid up, he was as competent to judge of the legal effect and operation of such payment as the defendant. He was not misled as to facts, and there can be no reason why the defendant should take upon himself the risk of any subsequent order of the directors. Whether they had a right to pass the resolution for crediting the stockholders with 14 per cent., upon the money paid in, or whether, after having done so, they had a right to rescind that resolution, are questions with which the defendant has no concern; that is a matter between the plaintiff and the directors. The plaintiff purchased the stock with his eyes open, knowing as much with respect to the stock as the defendant did. There is no evidence to warrant any charge of fraud or deception practised by the defendant; nor is there any warranty with respect to the stock. There is, therefore, no principle upon which the defendant can be made responsible for the loss upon the stock. Judgment must, accordingly, be for the defendant.

Judgment for the defendant.

### MONELL and WELLER against COLDEN.

Where a person is induced to purchase land [ \* 396 ]

by a false representation that a certain privilege is annexed to the land, but which is not included in the deed, he may maintain an action on the case against the vendor. (a)

Where a person was induced to purchase and give a higher price for a lot of land upon a navigable river by a fraudulent representation, that he would, as proprietor of the land, be entitled to a grant from the commissioners of the land-office, of the land covered with water adjacent thereto, and the purchase being completed, the purchaser, on applying for a grant from the commissioners, discovered that the adjacent land under water had previously been granted, and that the title to it was out of the state; it was held that the purchaser might maintain an action on the case for the deceit.

It seems, that the measure of damages, in such case, is the difference between the value of the land conveyed, and the sum which the purchaser was induced to pay by the fraudulent representation.

(a) Vide *Gallager v. Brunel*, 6 Cow. Rep. 346. ante, p. 224. *Allen v. Addington*, 7 Wendell's Rep. 9.

the plaintiffs became the purchasers of the land, they would, by virtue thereof, become entitled to make an application to the commissioners of the land-office for the lands under the water of *Hudson* river, adjacent to the said land, agreeable to the provisions of the laws of this state; and the plaintiffs, giving faith to such affirmation, and not knowing to the contrary thereof, agreed with the defendant to purchase the land, and give him therefor the sum of 20,500 dollars; that the defendant, on the same day and year aforesaid, in pursuance of the agreement, and in further prosecution of his said false and fraudulent intent, did fraudulently and wrongfully demand and receive from the plaintiffs the said sum, for the consideration money for the land, and thereupon did, by indenture of bargain and sale, bearing date the day and year aforesaid, executed by the defendant and his wife, grant to the plaintiffs, their heirs and assigns, the said land, together with all and singular the privileges, advantages, hereditaments, and appurtenances whatsoever, unto the said land belonging, or appertaining; whereas, in fact, long before the making the agreement between the parties, to wit, on the 25th of *June*, 1743, all the right and title of the king of *Great Britain*, then supreme lord and proprietor of the land under the water of all navigable rivers in this state, to all the land under the water of *Hudson* river adjacent to the before-mentioned and described premises, had been duly granted by letters patent, under the great seal of the then colony, unto one *Alexander Colden*, \*and his heirs and assigns, and which the defendant, before, and at the time of making the agreement with the plaintiffs, well knew, whereby the plaintiffs were not entitled to make application for such land under water, and could not obtain the same; and so the plaintiffs say, that by reason, &c., they were deceived, &c., and have lost all the use, benefit and profit arising from the right and title to the said land under water, and have sustained great damage.

The second count stated that the defendant, on the first of *June*, 1810, was seised in fee of all that certain other lot, &c., and proceeded, in all respects, similar to the first count.

The third count stated, that, by the 11th section of the act, entitled, "An act concerning the commissioners of the land-office, and the settlements of land," passed the 24th of *March*, 1801, it is enacted, "That it shall be lawful for the said commissioners to grant so much of the lands under the waters of navigable rivers, as they shall deem necessary, to promote the commerce of this state, provided, always, that no such grant shall be made to any person whatsoever, other than the proprietor, or proprietors, of the adjacent land; and provided, also, that every applicant for such grant shall, previous to his, or her, application, give notice thereof, by advertisement, to be published in one of the newspapers printed in this state, for six weeks successively, and shall cause a copy of such advertisement to be put up at the court-house of the county in which the

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN

[ \* 397 ]

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN.

[ \* 398 ]

lands lay, so intended to be applied for, and if there be no court-house in the county, then at such place as the commissioners direct;" that, on the 1st of *June*, 1810, a certain other conversation was had between the parties, of and concerning a certain other lot, lying, &c., containing, &c., which lay adjacent to, and was in extent, along the *Hudson* river, (a certain navigable river in this state,) 264 feet; that the defendant, in order to induce the plaintiffs to purchase the said last-mentioned lot, did affirm, and represent, that the defendant was the owner of the lot in fee; and did, also, falsely, fraudulently, and deceitfully, affirm, and represent, that whosoever was the owner, in fee, of the lot, would, by an application to the commissioners of the land-office, under the act aforesaid, receive a grant of so much land, under the water of the *Hudson*, as lay adjacent to the said lot, and that he, the defendant, would assist the plaintiffs in procuring \*such grant, in case the plaintiffs became the purchasers of the lot from the defendant; and that the plaintiffs, giving faith to such affirmation, and not knowing to the contrary thereof, agreed to purchase, &c., and by an indenture of bargain and sale, the defendant and his wife granted, &c., together with all and singular, &c., whereas, in fact, the commissioners of the land-office could not grant any land, under water, adjacent to the said lot, the same having been long before, to wit, more than twenty years before that time, duly granted to one *Alexander Colden*, and all the right of the people of the state was vested in the said *Colden*, his heirs and assigns, all which premises the defendant, at the time of making the false and fraudulent affirmation, well knew, and the defendant had no right or title from *Colden*, his heirs or assigns, which he well knew; and so the plaintiffs say, &c., concluding as in the first count.

The fourth count, after setting forth the act of the legislature, the conversation between the parties, sale and conveyance, as in the third count, stated, that the plaintiffs, on the 1st of *January*, 1813, at *Albany*, applied to the commissioners of the land-office for a grant of the land under water, which application was refused by the commissioners, they having no right to grant the same, which the defendant well knew; and that the said land, under water, had long before, to wit, on the 25th of *June*, 1743, been duly granted to one *Alexander Colden*, his heirs and assigns, which the defendant well knew; and that the right and title to the same was out of the people of the state, and not vested in them, which the defendant well knew. And so, &c.

The fifth count stated, that the defendant was seised, in fee, of, &c., bounded, &c.; and that, by the eleventh section of an act concerning the commissioners of the land-office, and the settlement of lands, passed, &c., it is enacted, &c.; (as in the third count;) that the *Hudson* river is a navigable river, and the owner, in fee, of the said lot, was, by virtue of the said act entitled, by an application to the commissioners of the land office, and by conforming to the directions of the act, to a grant



of the land under water, adjacent to the lot, provided the same had not been before granted by the commissioners, or by other legal authority, to some former owner of the land adjacent thereto, or other person; that, on the 25th of *June*, 1743, a patent was issued by the colony of *New-York*, under the then existing laws, to *Alexander Colden*, then being proprietor of the \*land above high water, adjacent thereto, in fee, for a certain space of ground under the water of *Hudson* river, 100 feet into the same, from high-water mark; the whole length of the lands held by *Colden*, in a certain tract in *Ulster* county, beginning on the north side of *Quassaick* creek, and extending northerly up *Hudson's* river, upon a straight line, 219 chains, being part and parcel of the space of ground and soil of *Hudson's* river, so granted to *Alexander Colden*, and being the land under water adjacent to the lot granted by the defendant to the plaintiffs, by reason whereof the right and title to the said land under water was vested in *Alexander Colden*, his heirs and assigns, and was out of the people of this state, and could not be granted by the commissioners of the land-office; that, at the time of the grievance hereinafter mentioned, the title to the same was vested in *Cadwallader R. Colden*, and not in the defendant, or any other person under him; that the piece of land before described was worth 500 dollars, but in case the land under the water, adjacent thereto, had still been vested in the people of the state, it would have been worth the sum of 30,000 dollars; that the plaintiffs, believing that the land under water had not been granted to any person, but was still vested in the people of the state, and not knowing to the contrary thereof, and being desirous of purchasing the lot of land, principally with intent to obtain from the commissioners of the land-office a grant of the land under water adjacent thereto, in order to improve the same by the erection of docks, stores, houses, and other buildings thereon, afterwards, to wit, on the 1st of *June*, 1810, applied to the defendant to purchase the lot of land from him, and informed him that they intended, in case they purchased the land, to apply to the commissioners of the land-office, for a grant of the land under water adjacent thereto, with intent to improve the same, by the erection of docks, stores, houses, and other buildings; and that thereupon a conversation was had between the parties of and concerning the said land under water, the defendant well knowing the object of the plaintiffs in making the purchase; and that the land, exclusive of the right to obtain a grant of the land under water, was of little value; and that the land under water had been granted to *Alexander Colden*, and did not belong to the people of the state, nor to the defendant, and that the plaintiffs could not obtain a grant thereof; the defendant, in order, fraudulently, to procure \*to himself the moneys of the plaintiffs, and to defraud them of the same, and fraudulently to induce them to purchase the lot of land for a larger sum than the same was truly worth, and in

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN.

[ \* : ! ]

[ \* 400 ]

ALBANY,  
August, 1816.

MONELL  
V.  
COLDEN.

order to have the plaintiffs to believe, that they, by the purchase, would be enabled to obtain a grant of the land under water, in the said conversation, did fraudulently conceal from the plaintiffs the fact that the land under water had been granted to *Alexander Colden*, and did not belong to the people of the state, nor to the defendant; whereas, in fact, the said land under water had, on the 1st of *June*, 1743, been duly granted to *Alexander Colden*, and the right thereto was out of the people of the state, and was not vested in them, nor in the defendant, but in one *Cadwallader R. Colden*. And so, &c.

The sixth count stated, that the defendant claimed to be seised, in fee, of a certain lot, situate, &c., bounded, &c., and that in a conversation, &c., (as in the first count,) the defendant, to induce the plaintiffs to purchase the said lot, did affirm and represent, that he was the owner of the lot in fee, and did, also, fraudulently, affirm and represent, that whosoever was the owner of the lot, would, by an application to the commissioners of the land-office, receive a grant for so much land under the water of the *Hudson* river, as lay adjacent to the lot, to wit, 264 feet in extent, and that he would assist the plaintiffs in procuring such grant, in case they became the purchasers of the lot, and the plaintiffs giving faith, &c., agreed to purchase, &c., and the defendant granted, &c., together with all and singular, &c.; that the plaintiffs, on the 1st of *January*, 1815, did apply to the commissioners of the land-office, for a grant of the land under water, according to the provisions of the act in such case made, and the application was refused, the commissioners having no right to grant the same, which the defendant well knew; that it had, on the 1st of *June*, 1743, been duly granted to *Alexander Colden*, his heirs and assigns, which the defendant well knew; that the right to the same was out of the people of the state, and was not vested in them, which the defendant well knew; and that all the right of *Alexander Colden* was vested in *Cadwallader R. Colden*, and not in the defendant, nor any person under him, which the defendant well knew. And so, &c. The plaintiffs' damages were laid at 30,000 dollars.

There was a general demurrer to the whole declaration, and a joinder in demurrer.

[ \* 401 ]

\**P. Ruggles*, in support of the demurrer, contended, 1. That the false affirmation, and fraudulent concealment, alleged in the plaintiffs' declaration, related wholly to property which formed no part of the subject matter of the contract set forth, and could not, therefore, be a ground of action. There was no averment of want of value, or deficiency in quality of the land sold. If the land covered with water was an appurtenant, it passed with the land sold; if not, there was no fraud.

2. The affirmations charged to be false and fraudulent, were nothing more than a statement of a public act of the legislature, equally known to both parties.

3. The transfer of the title from the state was a matter of public notoriety, and had ever been a matter of record, and about which there could not be that kind of concealment which, in contemplation of law, amounts to fraud. The vendee must take care to have a warranty; otherwise, he buys at his peril. The maxim is, *caveat emptor*.†

4. The alleged concealment consisted in an omission merely to inform the plaintiffs, whether the state or an individual owned the land under water, which, in either case, could only be obtained by the plaintiffs, by purchase, if at all; and there is no averment that they could not obtain it from the present owner, with equal ease, and on as good terms, as from the state, nor is it averred that they have not already obtained it.

5. The declaration affords no rule for estimating the damages, in case the plaintiffs are entitled to recover.

6. The whole contract, both as to the subject to be conveyed, and the consideration, was reduced to writing, and contained in the deed, which cannot now be varied by any parol evidence.‡

*Burr*, contra. The Court must take into consideration all the proof that can be given in evidence under the averments. A grant, or patent, for land, on record, is not notice to a purchaser.

Though a false affirmation as to the value of the thing sold, may not afford ground for an action, yet a false representation of facts, which has led the purchaser to make an erroneous estimate of the value, does furnish foundation for an action by the purchaser. Thus, in case of a false affirmation as to the \*rent, which lies within the knowledge of the vendor, a remedy lies against him for the fraud.§

So, a fraudulent concealment is ground for an action by the party injured; and the rule is the same, in regard to fraud, in law, as in equity.||

THOMPSON, Ch. J., delivered the opinion of the Court. The declaration in this case contains six counts, varying in some small, and mostly immaterial circumstances, the plaintiffs' cause of action. To this declaration there is a general demurrer, which admits the facts therein stated. If, therefore, any of the counts set forth facts sufficient to make out a cause of action, the plaintiffs are entitled to judgment. Without noticing each count separately, it will be sufficient to state, generally, that the facts alleged are, substantially, that a conversation was had between the parties relative to the purchase, by the plaintiffs, of the defendant, of a certain piece of land at *Newburgh*, adjoining the *Hudson* river, upon which conversation the defendant, for the purpose of inducing the plaintiffs to purchase the same, and to enhance the value thereof, fraudulently represented, that he was the owner of land, and, as such, had, by the laws of the state, the privilege of having a grant or patent for the land under

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN.

† *Sugd. L. of*  
*Vend.* 195. *Cro.*  
*James*, 196.

‡ 3 *Jims.*  
*R.p.* 506.

[ \* 402 ]

§ 1 *Salk.* 211.  
2 *Ld. Raym.*  
1118. 1 *Sid.*  
146.

|| 1 *Vesey*,  
127. 3 *Atk.*  
383. 6 *Mod.*  
34. 3 *Johns*  
*Rep.* 71.

ALBANY,  
August, 1816.

MONELL  
v.  
COLDEN.

water, adjoining to the land so to be sold; and that, if the plaintiffs would purchase the land, he would aid and assist them in obtaining a grant for the land under the water. The declaration states that, upon such conversation, an agreement for the purchase was made, for the land, described by metes and bounds, and all the privileges and appurtenances to the same belonging. It is then averred that, many years before, a patent for the land under the water had been granted to one *Alexander Colden*, and was then vested in one *Cadwallader R. Colden*, and was not in the people of this state, or in the defendant, *and that all this was well known to the defendant*. It is also averred, that the principal inducement with the plaintiffs to purchase the land was to obtain the water privilege, for the purpose of erecting storehouses and docks, and that the value of the land, without this privilege, was very greatly diminished; and that the plaintiffs had, pursuant to the directions of the act for that purpose, made application to the commissioners of the land-office, for a grant of the land under the water, opposite to the \*land so sold, and were refused the same by reason of the previous grant to *Alexander Colden*.

[ \* 403 ]

These facts being admitted, by the demurrer, as true, I cannot see why they do not show a good cause of action. They show a most palpable fraud practised upon the plaintiffs, in the sale of the land, and by which fraud they have been essentially and materially injured. If no representation had been made on the subject, by the defendant, both parties would have been equally chargeable with a knowledge of the law, and the public records of the state. But, according to the declaration, the defendant, knowingly and falsely, misrepresented the fact, with respect to the situation of the land under the water, and, if so, he is chargeable with all the damages resulting from such false representation. That a deed has been given, cannot affect the plaintiffs' claim for the fraud. The false representation was not respecting any thing to be included in the deed, but with respect to a privilege which the plaintiffs were to acquire, in consequence of owning the land on the shore adjoining the river. The law, which is a public statute, prohibits the granting a patent for land under the water, except to the owner of the land on the shore adjoining thereto. And it is a fact of public notoriety, that such grants are made almost as matter of course, and without any consideration, except the mere patent fees. One count in the declaration contains an averment that the land, without this privilege, would not be worth more than 500 dollars, but that, with the privilege, it would be worth 30,000. The declaration gives a rule of damages as certain as any declaration in such case, founded upon fraud, can give. It states the facts, and the damages arising therefrom are matter of inquiry upon the trial. What is the value of the privilege of which the plaintiffs are deprived, may be matter of uncertainty; but the value of the land sold, independent of this privilege, may be easily

332

ascertained, and the difference between that and the price paid ought, at all events, to be refunded. But the extent of the damages, or the rule by which they are to be ascertained, are not now subjects of inquiry. If the action can be sustained under such a state of facts, that is sufficient for the present; and, in my judgment, it can be maintained. The facts, as stated, clearly show, that, by the false and fraudulent misrepresentations of the defendant, the plaintiffs have been deceived, and materially \*injured. (6 *Johns. Rep.* 182. 13 *Johns. Rep.* 226. 4 *Taunt.* 786.) I am, accordingly, of opinion, that the plaintiffs are entitled to judgment.

ALBANY,  
August, 1816  
BRADLEY  
v.  
OSTERHOUDT.

[ \* 404 ]

Judgment for the plaintiffs.

### BRADLEY *against* OSTERHOUDT.

THIS was an action of covenant. The declaration contained two counts. The first count set forth an agreement made the 8th of *August*, 1811, by which the defendant covenanted that, provided the plaintiff should, on or before the first of *May*, 1813, pay him the sum of 1,800 dollars, he would, by the said 1st of *May*, convey to the plaintiff, by good and sufficient deeds, a full and unencumbered title, and with the usual covenants of seisin and warranty, extending to the title, and, also, to the quantity of land in the agreement afterwards stated, a house and certain lands described in the agreement; and covenanted, also, that he would not, in the mean time, cut any wood or timber from the lands, except for firewood, and that he would not feed the lands in the spring of the year 1813, and that he would not remove the straw and manure made thereon, nor work any quarries on the land; and the plaintiff, on his part, covenanted to pay the sum of 2,937 dollars and 50 cents, 1,800 dollars of which was to be paid on or before the 1st of *May*, 1813, another part of which was to be paid by satisfying a mortgage on the land, and indemnifying the defendant therefrom, and the residue to be paid at subsequent specified periods; and that the plaintiff would secure the performance of his contract, by a mortgage of the lands to the defendant. The plaintiff then averred performance of the covenants in the agreement contained, on his part to be performed, and that the defendant had executed a conveyance in pursuance of the agreement, and then assigned two breaches; first, that there were, long before, and at the time of the date and execution of the agreement, to wit, on the 8th of *August*, 1807, standing on the farm, and annexed to the freehold, and making part of the farm, a cider-mill, and a cider-press, and all the parts and apparatus for grinding apples and \*making cider, the whole covered by a thatched roof, and being

Where the plaintiff, in an action of covenant, assigns a particular breach, a general plea of performance, pursuing the words of the covenant, is bad on general demurrer.

So, where the covenant was to convey a farm, and the plaintiff assigns for breach, that, before executing the conveyance, the defendant removed from the premises a cider-mill which was annexed to the freehold, the defendant must answer particularly the breach assigned. (a)

[ \* 405 ]

(a) *V. e. Roosevelt v. Heirs of Fulton*, 7 *Cow. Rep.* 71. *Abbott v. Allen*, 14 *Johns. Rep.* 248.

ALBANY,  
August, 1816.  
BRADLEY  
v.  
OSTERHOUDT.

of the value of 100 dollars; and that, on the 22d of *December*, 1812, the defendant removed the same from the farm to some place unknown to the plaintiff, and never hath returned the same to the farm or to the plaintiff, and so the plaintiff saith, that the defendant hath not conveyed the farm to him according to the true intent and meaning of the said covenant and agreement. The second breach was for carrying away fifteen loads of straw, made on the farm.

In the second count, the plaintiff, after stating the agreement, and averring performance of the covenants on his part, assigned, for breach, the removal of the cider-mill, press, and appurtenances.

The defendant cravedoyer of the agreement, and pleaded, that, by the 1st of *May*, 1813, he did convey to the plaintiff, by a good and sufficient deed, a full, unencumbered title, and with usual covenants of seisin and warranty extending to the title, and, also, to the quantity of the land in the agreement specified, excepting such encumbrances as are therein excepted; and that he did not cut any wood except for firewood; and that he did not feed the lands in the spring of 1813; and that he did not remove from the farm the straw and manure made thereon, nor work any quarries on the land.

To this plea there was a general demurrer and joinder.

*C. H. Ruggles*, in support of the demurrer. He cited *Cro. Eliz.* 7. 1 *Sid.* 48. 3 *Com. Dig. Condition* (M.) 1 *Hen. Bl.* 270. *Com. Dig. Pleader*, (C.) 58. 10 *Johns. Rep.* 267. 1 *Hen. Bl.* 258, 259. 3 *East*, 38.

*J. Tallmadge*, contra. He cited 3 *East*. 38. 6 *Johns. Rep.* 5. *Howes v. Barker*, 3 *Johns. Rep.* 576. *Houghtalling v. Lewis*, 10 *Johns. Rep.* 297.

*Per Curiam*. This is an action of covenant upon articles of agreement, by which the defendant covenanted to convey to the plaintiff, by a good and sufficient deed, a full, unencumbered title to a farm and piece of land therein specified. The plaintiff, in his declaration, assigns, as a breach of the covenant, that the defendant, after the making and execution thereof, and before the giving of the deed, removed from the premises a cider-mill, \*which is averred to have been annexed to the freehold, and making a part of the farm, and so the defendant hath not conveyed to him, the plaintiff, the said farm of land, according to the true intent and meaning of the said covenant. The defendant, after cravingoyer of the agreement, pleads, that he did, within the time therein specified, convey to the plaintiff, by a good and sufficient deed, a full, unencumbered title to the land in the said articles specified. To which plea there is a general demurrer. This plea is bad. A particular breach having been assigned in the declaration, the plea should have answered it. Whether the covenant to convey the farm would

[ \* 406 ]

also embrace the cider-mill, might depend on circumstances. When the declaration avers, that it was annexed to the freehold, and making a part of the farm, the plea should have answered this breach. If the defendant relied on the acceptance of the deed as a fulfilment and discharge of the covenant, he ought to have so pleaded. The general plea of performance is not a sufficient answer to the special breach assigned. The plaintiff is, accordingly, entitled to judgment, with leave, however, to the defendant to amend his plea.

Judgment for the plaintiff.

ALBANY,  
August, 1816.

JACKSON  
v.  
SMITH.

JACKSON, *ex dem.* PRESTON and others, *against* SMITH.

THIS was an action of ejectment for lot No. 7, in the township of *Ovid*, and was tried at the *Seneca* circuit, in *June*, 1815, before Mr. Justice *Van Ness*.

The lessor of the plaintiff gave in evidence the letters patent for lot No. 7, in *Ovid*, to *Jacob Van Gelder*, bearing date the 13th of *September*, 1790, to which was attached a certificate from the secretary of state, that the patentee's name was entered in the ballot-book, and that he was described as a dead soldier, formerly belonging to the 5th regiment, (*Godwin's \*company*), and that from the list of dead soldiers, on file in the office, it appeared that the patentee died the 18th of *January*, 1779.

The plaintiff proved that the patentee served as a soldier in the *New-York* line of the army, and died about 18 months before the end of the revolutionary war, and left nine children, to wit, *Jacob*, (the eldest,) *Reuben*, *William*, *Elijah*, *Mary*, *Abigail*, *Elizabeth*, *Mercy*, and *Sally*, all of whom were born before their father enlisted as a soldier.

The plaintiff, also, gave in evidence a deed from *Jacob*, *William*, and *Elijah*, three of the children of the patentee, to *William Preston*, for the lot in question, dated the 15th of *March*, 1798, for the consideration of 1,000 dollars, and recorded the 14th of *May*, 1798; also, a deed from *William Preston*, for the same lot, to *David Matthews*, dated the 4th of *October*, 1798, for the consideration of 1,500 dollars, and recorded the 27th of *June*, 1799; also the last will of *David Matthews*, dated the 29th of *August*, 1810, by which he devised an undivided moiety of the lot to *John Matthews*, his only son, and the remaining moiety to his son *John*, and to *Robert Morris*, and *Garrit Wendell*, in trust, for certain purposes stated in the will; and,

though tenants in common with the grantor; and a subsequent deed executed by them, during such adverse possession, is inoperative and void, and subsequent releases by them to the grantor of the defendant, or the person under whom he derives title, enure to the benefit of the defendant. (a)

A person in possession of land claiming title, may purchase in an outstanding title, to protect that possession.

(a) Vide *Tuttle v. Jackson*, 6 *Wendell*, 213. *Jackson v. Winslow*, *Jackson v. Cody*, 9 *Cowen*, 13, 146 *Supra*, 316.

Where the defendant, having purchased a lot of land, and received a deed for the whole lot, in which the grantor stated himself to be the heir of the patentee, and he entered into

[ \* 407 ] possession under that deed, and it afterwards appeared that the grantor had title to one ninth part of the lot only, as a tenant in common, this was held not to alter the character of the defendant's possession, so as to prevent its being adverse; but that he must be deemed to have entered under his deed, as sole owner in fee of the whole lot.

Possession of land by a purchaser under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners,

ALBANY,  
August, 1816.

JACKSON  
V.  
SMITH.

also, a deed from *Elijah Van Gelder*, *David Van Gelder*, and *Abigail* his wife, *Solomon Van Gelder*, and *Mercy* his wife, *Elizabeth Philo*, *Sally Van Gelder*, and *Joseph Van Gelder*, and *Mary* his wife, to *William Preston*, for the same lot, dated *February* the 13th, 1798, and recorded the 15th of *May*, 1814.

The defendant gave in evidence, 1. A deed from *Reuben Van Gelder*, styling himself administrator and heir of *Jacob Van Gelder*, to *Stephen Thorne*, dated the 13th of *October*, 1791, for lot No. 7, in *Ovid*, for the consideration of 40 dollars; the deed was recorded the 16th of *September*, 1813, and contained no mention of any order of the Court of Probate, or of a surrogate, to authorize the sale. 2. A deed, with warranty, from *Stephen Thorne* to *Peter Smith*, for the same lot, for the consideration of 140 pounds, dated the 14th of *February*, 1794, recorded the 17th of *December*, 1795. The admission of this deed was objected to, because, in the certificate of acknowledgment endorsed, it was not stated that the judge before whom it was taken had personal knowledge of the grantor, or had received satisfactory proof of his identity; but the objection was overruled. 3. A quit-claim deed from *Jacob*, *William*, and *Elijah Van Gelder*, to *Reuben Van Gelder*, for the consideration of 16 pounds, dated the 7th of *January*, 1792, proved the 6th of *May*, 1791, by *Stephen Thorne*, a subscribing witness, and recorded the 25th of *January*, 1802. 4. A quit-claim deed of the same lot from *Sarah*, *Mercy*, *Mary*, and *Abigail Van Gelder*, and *Elizabeth Wichill*, to *Reuben Van Gelder*, for the consideration of 5 dollars, dated the 22d of *January*, 1812. 5. A deed from *Solomon Van Gelder*, *Elijah Van Gelder*, and *Joseph Van Gelder*, to *Reuben Van Gelder*, of the same lot, for the consideration of 5 dollars, dated the 19th of *August*, 1813; and, 6. A deed from *Peter Smith*, the elder, to the defendant, dated the 8th of *December*, 1807, for 214 and one fourth acres, part of the said lot.

The defendant proved that he and his father had lived on the lot 24 years; and the witness stated that in *July* or *August*, 1792, *Stephen Thorne* came to his house, and said he owned the lot, and the witness went with him to the lot, when *Thorne* told the defendant and his father, that he owned the lot, and the father of the defendant then purchased the lot of *Thorne*, but the witness did not know whether a deed was given, or how the business was done. It was further proved, on the part of the defendant, that, when *Preston* first attempted to purchase the lot of the heirs of the deceased soldier, he was told that *Reuben* had sold the lot to *Thorne*. The witness saw *Thorne* pay money to *Reuben*, and all the other heirs received a share of the money; but the witness did not know whether they were present at the sale to *Thorne*.

A verdict was taken, by consent, for the plaintiff, subject to the opinion of the Court on the above case.



*Wendell*, for the plaintiff, contended, 1. That the deed from *Reuben Van Gelder* to *Thorne*, passed only the share of *Reuben*, or one ninth part of the lot, or of the rights of his father as a soldier. The first section of the act† concerning the military lands, declares, all lands patented to officers and soldiers, who have died previous to the 27th of *March*, 1783, to have been vested in them at the time of their deaths respectively; and the 7th section provides that the act regulating descents shall apply to and govern all cases provided for in the first section, except where the lands were, on the 5th of *April*, 1803, \*held by bona fide purchasers or devisees under any person who would have been heir at law of the patentee, if that provision had not been made. The children of *Jacob Van Gelder*, the patentee, took as tenants in common, and the lot was not held by *Jacob*, as the eldest son and heir at law of his father. Again; *Reuben* described himself as the administrator and heir of *Jacob*. As administrator, he could have no right to convey. As heir of *Jacob*, (not being the eldest son,) he could be entitled only to one ninth. The entry of *Thorne*, under the deed, was only as tenant in common, claiming one ninth; so there could be no adverse possession.

2. The deed from *Jacob*, *William*, and *Elijah*, to *Reuben*, of the 17th of *January*, 1792, was antedated and void. Nothing was seen or heard of this deed until nine years after its apparent date, when it was proved by *Stephen Thorne*; but that deed could enure to the use of the grantee only.

3. The prior registry of the deed to *William Preston* would destroy the operation of that deed; for there is no evidence of a notice to *Preston* of its execution. Such notice must be direct and positive.‡

Again; an adverse possession makes a conveyance by the person out of possession void as against third persons; and though such adverse possession may prevent the operation of the deed so as to enable a person to recover in the name of the grantee, yet the title remains good in the grantor.§ Outstanding titles may be purchased in, to support a title.||

*E. Williams*, contra. The defendant and his father have enjoyed the premises, under a claim of title, for twenty years before bringing the action.

*Wendell*. The fact is, as will appear from the pleadings, though not stated in the case, that the suit was commenced six months before the statute could attach.

*Williams*. If the possession was adverse in 1798, at the time the deeds were given, under which the defendant claims, those deeds are void. Now, the fact is, that the defendant and his father were in possession in 1794, under the deed of *Thorne*, to whom *Reuben Van Gelder* had conveyed. There was, therefore, \*a legal incapacity in any person out of possession to con-

ALBANY,  
August, 1816.

JACKSON  
v.  
SMITH.

† 1 N. R. 1.  
303. (a)

[ \* 409 ]

‡ *Jackson v.*  
*Given*, 8 *Johns.*  
*Rep.* 137.

§ *Jackson v.*  
*Brinckerhoff*, 3  
*Johns. Cases*,  
101. *Williams*  
*v. Jackson*, 5  
*Johns. Rep.* 489.

|| *Jackson v.*  
*Dumont*, 9  
*Johns. Rep.* 55.  
*Jackson v.*  
*Wheeler*, 10  
*Johns. Rep.* 164.

[ \* 410 ]

ALBANY,  
August, 1816.

JACKSON  
V.  
SMITH.

vey the lot. No matter what was the character or extent of the conveyance from *Reuben Van Gelder* to *Thorne*, if the defendant purchased the fee of the whole lot, and held it as tenant in fee of the whole. He has continued in possession; the heirs of *Jacob* were not in a situation to make a legal conveyance; *Reuben*, the grantor, claimed to be heir to his father, who died in 1779, when, by the law of the state, as it then existed, the oldest son took the whole estate as heir at law. The possession taken under this deed was a possession of the whole. The antedating of the deed of the 7th of *January*, 1792, if it were proved, would not be material here; but there was no proof of the fact.

The prior registry of the plaintiff's deed can have no effect; if it was void in its creation, it can gain no preference by a registry. Then the defendant shows that he has the title of the heir at law of the patentee, and continued possession under it.

Again; the 7th section of the statute relative to military lands, as to the application of the statute of descents, excepts the case of *bona fide* purchasers holding on the 5th of *April*, 1803. Now, at that time, the father of the defendant was a *bona fide* purchaser in possession.

In *Jackson v. Demont*, it was held, that a release from the lessor, after issue joined, in an action of ejectment, will protect the defendant against the lessor; and in *Jackson*, ex dem. *Bonnel & Goodyear, v. Foster*,† it was held that the plaintiff could not recover on the demise of a lessor, who had released his interest to the defendant.

† 12 *Johns. Rep.* 488. *Jackson*, ex dem. *Bonnel, v. Sharp*, 9 *Johns. Rep.* 163.

*Van Vechten*, in reply, contended, that the character of the possession of the defendant and his father, since 1794, must be in conformity to the title they then acquired; and whatever may be the form of the deed from *Thorne*, if he could convey only an undivided ninth part, the conveyance must be construed, and take effect, according to the rights of the grantor. The grantor did not describe himself as heir at law, but only as administrator and heir. When a person having right enters into possession of land, the law intends that he entered according to his right. Then, he insisted, the character of the possession of the defendant was that of a tenant in common of one ninth part; and so \*could not be adverse to the other heirs, or the tenants in common of the remaining eight parts. It appears from the *Nisi Prius* record, that the process was returnable in *January*, 1812, so that the statute of limitations could not prevail. The Court will go far to protect the rights of tenants in common from an ouster by an adverse possession under a co-tenant.‡

‡ *Van Dyck v. Van Beuren & Vosburgh*, 1 *Caines's Rep.* 83.

§ *Caines's Rep.* 83.

Again; in *Jackson*, ex dem. *Potter, v. Hubbard*,§ this Court held, that under the act of the 8th of *January*, 1794, for the registry of deeds in the military tract, a prior deed not deposited in the clerk's office was void against a subsequent *bona fide* purchaser, whose deed had been deposited. The defendant was

bound to take notice of the deed to *Preston*; whatever is sufficient to put a party on inquiry is good notice. Where a purchaser cannot make out a title but by a deed which leads him to another fact, he shall be presumed to know that fact.†

Again; a sound construction of the act of 1803 decides the character of the possession. It provides for a compensation for improvements made by settlers *under color of title*. The possession is to be transferred to the true owner, on making payment for the improvements. This shows that the legislature intended to protect the titles to lands under deceased soldiers, and, at the same time, to protect those who entered under color of title; thus doing justice to all parties, and giving the land to its true owner.

*YATES, J.*, delivered the opinion of the Court. The important inquiry in this cause is, as to the character, duration, and effect of the defendant's possession; and it involves the following questions: 1st. Whether the premises have been held adversely for 20 years before suit brought; and, 2d. If adverse, (although not for that period,) what the legal operation of such possession is, with regard to the conveyances introduced by both parties, as evidence of title.

The deed of *September, 1791*, from *Reuben Van Gelder* to *Stephen Thorne*, for the whole lot, cannot control the possession of the defendant, and of his father, so as to make it the entry and possession of a tenant in common, merely because it gave title to no more than one ninth part of the lot.

The grantor in this deed states himself to be the heir of the patentee, and the conveyance is for the whole lot; and it may well be inferred, that *Thorne*, at the time, supposed that it gave \*him title to that extent, and that he purchased accordingly. It afterwards appearing that *Reuben* was a younger son, could not alter the nature of the defendant's possession. If *Reuben* had been the heir at law of *Jacob Van Gelder*, the soldier, *Thorne*, would have held the whole lot under the statute of the 5th of *April, 1803*, as a *bona fide* purchaser.

The conduct of *Reuben*, subsequently to the conveyance made by him, confirms, in a great degree, what has been stated to have been the intention of all the parties when it was executed. The consideration received was divided between all the children. They, therefore, supposed the sale made by *Reuben* sufficient to pass the entire lot, or they never would have accepted of their proportion of the consideration received for it; and *Thorne*, supposing himself to have obtained a good title, did not hesitate to dispose of it to a person who entered as owner of the whole lot.

If, therefore, it is conceded, that *Reuben's* deed conveyed one ninth part only to *Thorne*, and that if he had entered under it, such entry would have been according to his right as tenant in common, and that his co-tenants could not have been disseised,

ALBANY,  
August, 1816.  
JACKSON  
v.  
SMITH.  
† 2 *Fonbl.*  
*Equ.* 155. 2  
*Ch. Cas.* 246.

[ \*412 ]

ALBANY,  
August, 1816.

JACKSON  
v.  
SMITH.

[ \* 413 ]

because the possession would not have been adverse to their rights; still, this cannot change the character of the defendant's possession, nor the previous possession of his father. Neither of them had any knowledge of this deed. The father purchased, by warranty deed, from *Thorne*, who represented himself to be the sole proprietor of the lot. As early as *July* or *August*, 1792, while the defendant's father was on the lot, *Thorne* went to view it, and avowed himself to be the owner, and sold it for 140*l*. From that period, in strictness, the adverse possession commenced. At all events, it commenced from the date of *Thorne's* deed to the elder *Smith*, which was in *February*, 1794. It is evident, therefore, that the doctrine, in relation to the possession of tenants in common, does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger, of any lands held in common. And it will not be questioned, that the possession of a purchaser under such a deed, given without right on the part of the grantor, would, notwithstanding, be adverse to the rightful owners, although held by them in common. But, in the present case, no such tenancy did, in fact, exist. The patent had issued to a deceased soldier; and it may well be questioned, whether an equitable title, even, \*could pass to his children. The statute to regulate descents as to property, in that situation, was not passed until nine years subsequent to the sale made by *Thorne* to the father of the defendant; so that the possession taken by him must be deemed adverse to all the world. (*Jackson v. Wheeler*, 10 *Johns. Rep.* 166. *Jackson v. Foster*, 12 *Johns. Rep.* 490.)

It is not stated in the case at what time this suit was commenced, but the plaintiff's counsel, in the course of the argument, mentioned, that it appeared from the files in the clerk's office, that the declaration was returnable in *January term*, 1812. If that is so, the possession has not been adverse for a period sufficient to bar the plaintiff's right to recover on that ground; for, before *Thorne* went to view the lot, it is not pretended that *Smith* claimed it, or that he held it in the right of any one. He, doubtless, during that period, possessed it as a mere intruder; but the adverse possession, subsequent to *February*, 1794, when he had purchased it from *Thorne*, who then assumed to claim the whole lot, and having taken his warranty deed, was sufficient to defeat the conveyances obtained by *William Preston* in 1798. The conduct of *Thorne*, afterwards, could not alter the operation of this possession. There is no evidence that *Smith* had any knowledge of it; and such conduct may well be attributed to the interference of *Preston* with the title, because the lot had been conveyed by a warranty deed to the elder *Smith*, so that *Thorne* was interested in securing *Smith's* possession. The deeds, then, from *William Van Gelder*, *Jacob Van Gelder*, and *Elijah Van Gelder*, to *William Preston*, of the 15th of *March*, 1798, and of the other children to him, dated the preceding *February*, being rendered inoperative, the plaintiff, of

course, cannot be benefited by the demises of *William Preston*, *John Matthews*, *Robert Morris*, and *Garrit Wendell*, and the conveyances, subsequently executed by all the children to *Reuben*, must enure to the benefit of the defendant, who held under *Reuben*, through *Thorne*; because the facts in the case sufficiently show, that those conveyances were obtained for the purpose of granting or securing *Thorne's* title under *Reuben*; and *Smith* being *Thorne's* grantee, he, and those claiming under him, had a right to protect themselves under a title thus obtained, in the same manner as though he had purchased from the children himself. It is an established rule of law, that a party in possession claiming title, may purchase in an outstanding title. (*Jackson, ex dem. Humphrey, v. Given*, 8 Johns. Rep. 139. 1 Johns. Cases, 81. 5 Johns. Rep. 489. 8 Johns. Rep. 479. 12 Johns. Rep. 207.) There, therefore, can be no recovery on the demise of the other children of the patentee, as they have parted with their right in the premises to *Reuben*, which, as before stated, enures to the benefit of his grantee and those claiming under him. The defendant is entitled to judgment.

VAN NESS, J., dissented.

Judgment for the defendant.

ALBANY,  
August, 1816.

VAN BRUNT  
V.  
SCHENCK.

[ \* 414 ]

### VAN BRUNT and another against SCHENCK.

THIS was an action of trespass for seizing and taking a schooner called the *Nancy*, against the defendant, who is surveyor of the port of *New-York*. At a former trial of this cause, a verdict had been found for the plaintiff, which, in *August* term, 1814, was set aside, and a new trial granted, (see 11 Johns. Rep. 377.) and the cause was again brought to trial at the *New-York* sittings, in *April*, 1814, before Mr. J. Van Ness.

It was stated in the libel filed in the District Court of the *United States* against the schooner *Nancy*, that the defendant, on the 6th of *October*, 1809, seized the vessel as forfeited to the use of the *United States*. It was proved, on the part of the plaintiff, that, while the *Nancy* was so under seizure, the defendant admitted that he had used the vessel in transporting his furniture, from his house at *Hell-Gate*, to *New-York*, and offered to pay the plaintiffs for the use of her, but they declined accepting any payment for the use of her, and referred the defendant to their attorney. It was also proved that the witness personally attended to the conducting of the trial of the suit in the District Court.

It was proved, on the part of the defendant, that all seizures, by

When a vessel has been seized by an officer of the customs, who, after the seizure, commits an abuse of the authority vested in him, and the vessel is then acquitted in the District Court, but a certificate of probable cause given, the officer, although liable for the particular act of abuse, is protected, by the certificate, from being made a trespasser *ab initio*.

The abuse of an authority given by law, makes the abuser a trespasser *ab initio*, but not the abuse of an authority in fact (a)

(a) Vide *Allin v. Crofoot*, 5 Wendell's Rep. 506. *Campbell v. Stakes*, 2 *Ibid.* 137. See also the cases cited in note (a) to *Gardner v. Campbell*, 15 Johns. Rep. 401.

AJLIANY,  
August, 1816.  
VAN BRUNT  
v.  
SCHENCK.  
[\* 415]

whomsoever made, are stated in the libel to be made by the surveyor, who had an interest in them, and that the defendant was the only officer who took an active part in preparing the causes for trial. *William Van Beuren*, a witness for the \*defendant, testified that he seized the *Nancy*, for a breach of the embargo laws, and immediately reported the seizure to the defendant, who approved of what he had done. The witness did not recollect whether he had any particular instructions from the defendant to seize the vessel in question, but he had a general order to seize all suspicious vessels. The witness also stated that the defendant applied to him to procure a vessel to bring his furniture from his country seat to *New-York*, and that the witness, not being able to procure any vessel for that purpose, urged the defendant to take the schooner and pay the owners for the use of her; that the defendant at first declined, but afterwards assented to it; and the witness went in the schooner to the country seat of the defendant, and returned with the schooner in the afternoon of the same day in which she was taken away.

It appeared from the proceedings in the District Court, against the schooner *Nancy*, that, on the 5th of *December*, 1809, an order was made, by consent in the cause, that the vessel should be sold by the marshal, and the proceeds paid into Court; and that, the cause having been heard in the District Court, the Court, afterwards, on the 8th of *January*, 1810, decreed that the libel should be dismissed, that there was probable cause of seizure, and that the amount of the sale of the vessel, after deducting costs, should be paid to the claimants. The vessel was sold by the marshal for 320 dollars, and the sum of 122 dollars 75 cents was paid to the claimants in pursuance of the order of the Court.

When the cause was about to be submitted to the jury, the judge stated that, under the decision of the Court in this cause, on the motion for a new trial, he should feel himself bound to charge the jury against the plaintiffs' right to recover: the plaintiffs then submitted to a nonsuit, with liberty to move the Court to set it aside.

The cause was argued by *Wells* and *Brinckerhoff*, for the plaintiffs, and by *Baldwin*, for the defendant.

THOMPSON, Ch. J., delivered the opinion of the Court. This case, as it now appears before the Court, differs essentially from the former. (11 *Johns. Rep.* 377.) *Van Beuren*, who, in fact, made the seizure, testifies, that he had general orders to seize all suspicious \*vessels. From whom these orders were received he does not state. But he says he reported the seizure to the defendant, who approved of what he had done. This was a complete ratification and adoption of the act of seizure, and puts the defendant in the same situation as if he himself had made the seizure; and the question then arises, whether the subsequent use of the vessel, by the defendant, made him such a

[\* 416]

342

trespasser, *ab initio*, as to make him responsible for the full value of the schooner at the time of seizure. The decision of this question will, I think, depend entirely upon the legal effect and operation of the certificate of reasonable cause of seizure, given on the acquittal of the vessel. Independently of this certificate, the case would fall within the rule, that the abuse of an *authority given by law* makes the abuser a trespasser *ab initio*. The reason of this rule, and why it does not apply equally to an abuse of an *authority in fact*, does not seem very satisfactorily explained in the books. It is sometimes said that the law intends from the subsequent tortious act, that there was, from the beginning, a design of being guilty of an abuse of the authority. At other times, it is made to rest upon the general reasonableness of the rule, that where the law has given an authority, it should, in order to secure such persons as are the objects of the authority from the abuse thereof, make every thing done, void, when it is abused, and leave the abuser in the same situation as if he had done every thing without any authority. But whatever may be the reason of the rule, it is founded, in some measure, in fiction, and this fiction must not be made to work injustice in the face of the express provision of the act of congress, (March 2, 1799,) which declares, that where there is a certificate of reasonable cause of seizure, the person who made the seizure, or the prosecutor, shall not be liable to action, suit, or judgment, on *account of such seizure*. This certificate does not shield the person making the seizure from responsibility, for damages which may be occasioned by any subsequent abuse of his authority. It only goes to protect him from an action on account of the seizure. That is, if there was reasonable cause for the seizure, the person making it shall not, for such act, be deemed in any manner responsible. But, to make the defendant a trespasser *ab initio*, is making him responsible for the act of seizure, for which the statute declares he shall not be answerable. This construction gives \*full force and effect to the certificate of reasonable cause, and still makes the seizing officers liable for all injury occasioned by an abuse of their authority. Any other construction renders this certificate a nullity. The seizing officer is, by this certificate, put in the situation of a person who is guilty of an abuse of an *authority in fact*, who does not thereby become a trespasser *ab initio*, but is liable to make satisfaction to the owner of the property for the abuse of his authority. The object which this act of congress had in view is very analogous to the one provided for by our statute as to irregular distresses, (1 N. R. L. 436.) (a) which declares, that when any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done, the party making it shall not be deemed a trespasser *ab initio*, but the party aggrieved may recover full satisfaction for the special damages sustained, and no more, in an action of trespass on the case.

(a) 2 R. S. 504, 5.

ALBANY,  
August, 1816.  
VAN BRUNT  
v.  
SCHENCK.

[ \*417 ]

ALBANY,  
August, 1816.

MATTER OF  
WALDRON.

To make the defendant responsible for all damages, which the abuse of his authority has occasioned, and no more, will be doing ample justice to both parties, and affording that protection to public officers contemplated by the act of congress. But to make the defendant liable to the full value of the vessel at the time of seizure, by a fiction of law, which may, perhaps, make him a trespasser *ab initio*, would be carrying the fiction farther than reason and justice would warrant. I should incline to think a special action on the case, for the actual damage sustained by the use of the schooner, would lie, and would be the fit and appropriate action. The reasonable cause for the seizure, which the certificate shows, ought to be considered as making that act lawful, and the injury to the plaintiffs is, therefore, mediate and consequential, and so not a proper case for an action of trespass.

[\* 418]

There is another fact disclosed in this case, which did not appear in the former, and which would seem to furnish an answer to the claim set up in this action, for the value of the schooner. By an order of the District Court, made with the consent of the proctor for the claimants in that Court, (and who are the plaintiffs here,) the vessel was sold, and the money paid into Court, to abide the event of the suit. This money, by the decree dismissing the libel filed in the cause, was ordered to be paid over to the claimants, which has been done, as \*appears by the receipt of their proctor, bearing date the 7th of *January*, 1810. This ought to be considered an affirmance of the proceedings, and an election to take that which, by the consent of parties, was made the substitute for the vessel. (20 *Vin. Ab.* 528. pl. 4.) Independently, however, of this circumstance, I think the defendant cannot be made a trespasser *ab initio*, but is only liable in a special action on the case, for whatever damage the plaintiffs have sustained, by the use of the vessel by the defendant, contrary to his duty as a public officer; and that the motion to set aside the nonsuit must, accordingly, be denied.

VAN NESS, J., dissented.

Motion denied.

### In the Matter of MARGARET ELIZA WALDRON.

Where a habeas corpus is directed to a private person to bring up an infant, the Court are bound, *ex*

*debito justitie*, to set the infant free from improper restraint; but whether they shall direct it to be delivered over to any particular person, rests in their discretion under the circumstances of the case; and that although the person making the application be the father of the infant.

Where an infant was in the custody of its grandfather, and it appeared that it would be more for the benefit of the infant to remain with its grandfather than to be put under the care of the father, and *ex improposito* restraint was shown, the Court refused to direct the infant to be delivered to the father. (a)

(a) Vide *Matter of M Dowles*, 8 *Johns. Rep.* 328.



Court, that *John P. Waldron* had married the daughter of *Andrew M Gowan*, and that, having become embarrassed and insolvent, *M Gowan*, in *February*, 1813, took his daughter to his house, without her or her husband's consent, as was alleged on the part of *Waldron*, but positively denied by the affidavits on the opposite side. *Mrs. Waldron* lived with her father until her death; and during her residence with her father, *Margaret Eliza Waldron* was born, who has always been supported by her grandfather. *Waldron* used to visit his wife shortly after her removal to her father's, but had discontinued his visits for a long time previous to her death, and had not visited his child, being deterred, as he alleged, but which was denied by the other side, by the unkind and repulsive treatment which he met \*with from *M Gowan* and his family. *M Gowan* is a man in very affluent circumstances, and abundantly able to educate and maintain his granddaughter; and it appeared, that *Waldron* was insolvent, and unable to pay certain trifling debts which he had contracted, although it was alleged that his mother, with whom he lived, was competent and willing to support him and his daughter. It appeared, also, that the infant's mother was the only daughter of *M Gowan*, and the infant the only remaining grandchild in the family, and would, most probably, receive the greater part of the property of her grandparents, on their death.

ALBANY,  
August, 1816.

MATTER OF  
WALDRON.

[ \* 419 ]

*Van Wyck*, in behalf of the father, moved to have the infant discharged from the custody of her grandfather, and delivered to her father. In support of the motion, he cited *The King v. Delaval*, (1 *Wm. Bl. Rep.* 412.) and *The King v. De Manneville*, (5 *East's Rep.* 220.)

*T A. Emmet* and *Smith*, contra, contended, that this was not the proper writ for the father in this case; that the writ of *habeas corpus* was for the benefit of a prisoner unlawfully detained in custody, and granted on his application. The writ is solely for the benefit of the person wrongfully deprived of his liberty, and for the purpose of obtaining his liberty; third persons never apply for it, except in the case where the party is so confined that he cannot himself make the application. Here there is no pretence that the child is forcibly detained, or in any degree deprived of its liberty; on the contrary, it is under the care of its grandparents, in whose house it was born, and who have taken the whole charge of its nurture and education.

The only case in which this writ has been abused, or wrongfully applied to a case where the party was not under restraint, is that of *The King v. Johnson*;† and that case was, afterwards, overruled as not law.‡ All that the Court is bound to do, is to see that the party is not wrongfully imprisoned, or detained against his will. If he is so, they will set him at liberty; and, if of sufficient age, leave him to go where he pleases. This writ is not to be made the engine of parental authority. Where a child was 13 years old, he was allowed to express his wish,

† 1 Str. 579.

‡ 1 Str. 982.  
*King v. Smith*

ALBANY,  
August, 1816.

MATTER OF  
WALDRON.

[ \* 420 ]

† *Bac. Abr.*  
*Hab. Corp.* (B.  
13.)

and the Court of K. B., in the exercise of its discretion, refused to order \*him to be delivered over to his father. Where the child is of such tender years that it cannot form a proper judgment, this Court will exercise its judgment for the benefit of the infant, and do what, in its conscience, it thinks most for the interest of the child. It is in the sound discretion of the Court to alter the custody of the infant, or not. The interest and welfare of the child are alone to be viewed on this writ. The rights of parental authority, or claims of guardianship, are to be tried in a different way.†

The Court said they would take time to advise until the next term, and remand the child, in the mean time, to the custody of the grandfather, with the view that the matter might be amicably adjusted, so as to render any interposition of the Court unnecessary; and they strongly recommended to the father to let his child continue with its grandparents.

*Cur. ad. vult.*

No compromise, or agreement, having taken place between the parties claiming the custody of the child,

THOMPSON, Ch. J., now delivered the opinion of the Court. Upon the return to the *habeas corpus*, which has been allowed in this case, the question presented to the Court is, whether they are bound to deliver over the child to her father. From the affidavits which have been laid before the Court, little doubt can be entertained that it will be more for the benefit of the child to remain with her grandparents than to be put under the care and custody of her father; and if this Court has any discretion in such case, it will, no doubt, be discreetly exercised, by permitting the child to remain where she is.

The general principle applicable to cases of this kind, is laid down by Lord Mansfield, in *Rex v. Delaval and others*, (3 Bur. 1436.) that in cases of writs of *habeas corpus*, directed to private persons to bring up infants, the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint. But they are not bound to deliver the infant over to any particular person. This must be left to their discretion, according to the circumstances that shall appear before them. In the present case, the child cannot be considered under any improper restraint; \*she was born at the house of her grandparents, and has always lived with, and been brought up by, them. There is nothing appearing, in any manner, to show that she is kept there against her will and consent. The case of the *Commonwealth v. Addicks and Wife*, (5 Binney's Rep. 520.) is very much in point, and a strong corroboration of the principle, that it is a matter resting in the sound discretion of the Court, and not matter of right which the father can claim at the hands of the Court. It is to the benefit and welfare of the infant to which the attention of the

[ \* 421 ]

Court ought principally to be directed ; and this can be much better guarded and protected by the Court of Chancery, under its peculiar jurisdiction, than by this Court upon *habeas corpus*. (10 *Ves. jun.* 59.)

ALBANY,  
August, 1816.  
GENERAL  
RULE.

We think, therefore, that it will be a due exercise of the discretion with which the law has invested us, to deny the present application ; leaving the father to pursue his remedy, if any he has, in the Court of Chancery, where questions of this kind more properly belong ; there being no actual improper restraint of the infant. We think proper, however, to suggest, that the father ought, on all suitable occasions, to be permitted to see the child, taking it for granted that he will not attempt to take her away from the care and custody of her grandparents, except by the aid of some judicial proceeding.

Motion denied.

---

---

\*GENERAL RULE.

[ \* 422

August 22d, 1816.

ORDERED, That whenever special bail shall be regularly excepted to, bail thus excepted to, or such other persons as become special bail in lieu of, or in addition to, the said bail to which exceptions have been taken, may justify before those officers authorized by law to take recognizance of bail in actions depending in this Court, due notice being first given, to the opposite party, of the time and place, and before whom, such bail will justify ; to the end, that the sureties in any such recognizance of bail may be examined concerning the value of their estate, and their personal circumstances ; unless one of the judges of this Court shall, before such justification, by order, direct the justification to be in open Court ; reserving to either party aggrieved, when such justification is not made in open Court, a right of appeal to this Court from the decision of such officer making such examination of the sureties, on an affidavit of the facts, and on regular notice of a motion to set aside any such justification.

END OF AUGUST TERM

347

# CASES

ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1846, IN THE FORTY-FIRST YEAR OF OUR  
INDEPENDENCE.

---

### MARSHALL *against* MOTT.

In collateral matters arising in the progress of a suit, as on a motion for a commission to examine witnesses abroad, affidavits taken before magistrates or public officers out of the state, may be read. (a)

*GARR*, for the plaintiff, moved for a commission to take the examination of witnesses abroad, in this cause. He offered to read an affidavit for this purpose, taken before the chief judge of the Court of Sessions for *Suffolk* county, in the state of *Massachusetts*.

*Weyman*, contra, objected, that the affidavit, not being before a proper officer, could not be read in this Court.

*Per Curiam*. Where the party resides out of the state, we have been liberal in allowing affidavits taken abroad to be read in all collateral matters arising in the progress of a cause. Affidavits taken before the mayor of *Philadelphia*, before *American* consuls, and other public agents in foreign countries, have been often read in this Court, in support of similar applications.

Motion granted.

(a) Vide *Tucker v. Ladd*, 4 *Cowen*, 47.

---

[ \* 424 ]

### \*BURTUS *against* M'CARTY and another.

Actions on recognizances of bail, taken in suits brought in Courts of common pleas, must be brought in the Court of the county in which the suit was originally commenced, if the parties who enter into the recognizance reside within its jurisdiction, and not in this Court.

*PAINÉ*, for the defendants, moved to set aside the execution, judgment, and all proceedings in this cause. The suit was on a recognizance of bail, taken in the Court of Common Pleas of *Rensselaer* county. The defendants, who were special bail

of the county in which the suit was originally commenced, if the parties who enter into the recognizance reside within its jurisdiction, and not in this Court.

for the defendant in the original suit, both resided in *Rensselaer* county, where they entered into the recognizance, and where they were arrested in this suit. The *captas* was returnable in *August* term, and the principal was surrendered by his bail into the custody of the sheriff of *Rensselaer* on the 9th *August*, and notice thereof given to the plaintiff's attorney on the same day.

NEW-YORK,  
Oct. 1816.

BUNTING  
v.  
BROWN.

*Foot, contra.*

*Per Curiam.* The suit on the recognizance of bail must be brought in the county where the original suit was commenced. In *Davis v. Gillet*, (7 *Johns. Rep.* 318.) the bail had removed out of the county, so that they could not be there personally served with process. In *Haswell v. Bates & Lewis*, (9 *Johns. Rep.* 80.) which was an action on a bail bond taken in a Court of common pleas, the bail also resided out of the county; and in *Gardiner v. Buchan & Olcott*, (12 *Johns. Rep.* 459.) which was also an action on a bail bond, the principal resided out of the county, though the bail lived within the county in which the original suit was brought.

Each Court has its own rules of practice as to proceedings against bail, and it would be inconvenient for this Court to be inquiring into the rules of practice of the different Courts of common pleas. In the cases which have been mentioned, the party would have been without remedy, unless this Court had taken cognizance of the suit against the bail; and having taken cognizance of the cause, we afford the same relief as the Court of Common Pleas. Here, the parties are within the jurisdiction of the Court of the county in which the original suit was commenced, so that they can be served with process out of that Court on their recognizance. They must, therefore, be sued in the Court of Common Pleas. (a)

Motion granted.

(a) Vide *Steinburgh v. Bigelow*, 3 *Wendell's Rep.* 42. *Davis v. Packard*, 6 *Wendell's Rep.* 327.

### \*BUNTING against BROWN.

[ \* 425 ]

THIS was an action on the case, to recover damages for the non-delivery of a quantity of salt, which the defendant had sold to the plaintiff, and contracted to deliver to him at *Turks-Island*. The defendant was arrested, and held to bail, without a judge's order. The plaintiff, being summoned before the recorder of the city of *New-York*, to show cause, &c., made an affidavit of the cause of action; but the recorder, being of opinion that the defendant could not be held to bail, without an order of a judge for that purpose, previously obtained, ordered him to be discharged, on filing common bail, and the bail bond to be cancelled.

In an action for damages for the non-delivery of goods, pursuant to contract, the defendant may be held to bail, without a judge's order; but if a defendant is arrested, and held to bail, in an action not bailable, an affidavit of the

cause of action, subsequently made, will not support the arrest.

NEW-YORK,  
Oct. 1816.

Garr, for the plaintiff, moved to vacate the order of the recorder.

WATERMAN  
v.  
VAN BEN-  
SCHOTTEN.

E. W. King, contra.

*Per Curiam.* Where the action is not bailable, an affidavit of the cause of action, made subsequent to the arrest, will not support the holding to bail. But this suit was on a contract on which the defendant might have been held to bail originally without a judge's order. If the sum in which the defendant is held to bail be too large, application may be made to a judge to mitigate it.

Motion granted.

### WATERMAN against VAN BENSCHOTTEN.

If, in an action of slander, commenced in a Court of common pleas, and removed into this Court by *habeas corpus*,

[ \* 426 ]  
the plaintiff here recovers less than fifty dollars damages, he is entitled to no more costs than damages. (1 N. R. L. 344. sess. 31. ch. 96. sect. 37.) (b)

THIS was an action of *slander*, commenced in the Court of Common Pleas of *Otsego* county, and removed into this Court by *habeas corpus*, in which the plaintiff here recovered *ten* dollars damages only, and the recorder of *Albany* had taxed the costs at ten dollars.

\* *Starkweather*, for the plaintiff, applied for a re-taxation of the costs.

Campbell, contra.

*Per Curiam.* The motion must be denied. The *sixth* section of the act (1 N. R. L. 344.) (a) declares, that, in all actions of slander prosecuted in the Supreme Court, if the jury shall assess the damages under *fifty* dollars, the plaintiff shall recover no more costs than damages. There is no saving here, as is to be found in the *fourth* section, with respect to causes removed from inferior Courts. It is probably a *casus omissus*; but as costs are only given by statute, we have no discretion to allow them against the express provision of the act; nor can we construe the word *prosecute* as applying only to such suits as are originally commenced in this Court. The same word is used in the *fourth* section, yet the *saving* was deemed necessary as to causes removed from the Courts of common pleas. Besides, the last proviso of the fourth section declares, that nothing contained in that section shall extend to certain actions mentioned, among which is that of slander; so that we must construe the sixth section by itself, or as if the fourth section had not been inserted in the act. If so, there can be no ground for any distinction between actions originally commenced here, and those removed from an inferior Court by *habeas corpus*.

Motion denied

(a) 2 R. S. 613.

(b) Vide *Salisbury v. Parker*, 7 Cow. Rep. 150

JACKSON, *ex dem.* WATSON, *against* SMITH.NEW-YORK,  
Oct. 1816.JACKSON  
v.  
SMITH.

THIS was an action of ejectment, brought for the recovery of lot No. 13, in the township of *Camillus*, which was tried before Mr. J. Van Ness, at the *Onondaga* circuit, in June, 1815.

At the trial, the plaintiff gave in evidence a deed from *Timothy Downs* (who was described therein as the heir at law of *Patrick Downs*, to whom a patent for the lot in question had been \*granted) to the lessor of the plaintiff, for the premises, dated the 16th July, 1793; also a fine *sur cognizance de droit come ceo, &c.*, levied in this Court between *Hunlock Woodruff*, plaintiff, and *Elkanah Watson*, the lessor of the plaintiff, deforçant, on Tuesday, the 13th of August, 1805, of the premises in question, and which was registered in the clerk's office of the county of *Onondaga*, on the 12th of September, 1805, and a release, dated 10th of August, 1805, of the premises, from *Hunlock Woodruff*, to the lessor of the plaintiff.

The defendant gave in evidence that he went into possession of the premises under a contract for the sale thereof to him, by one *Joseph Brush*, in the year 1807, at which time the land was wild and uncultivated; and that he had continued in possession ever since, and made improvements.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on the above case.

*H. Bleeker*, for the plaintiff, contended, that the plaintiff, having shown a good title, *prima facie* at least, was entitled to recover; that a fine was a solemn assurance of record, and equivalent to a judgment.† The fine, in this case, bound all parties, and strangers also, after five years, and the defendant's deed was subsequent to the fine.

*Sabin*, contra, insisted, that the defendant, having entered within five years after the fine was levied, was within the saving clause of the act, (1 N. R. L. 358. sess. 36. ch. 58. s. 7.) He cited *Jackson, ex dem. Scott, v. Huntly*,‡ as analogous in principle. That the entry alone was sufficient, without bringing a suit, there being no one in actual possession of the premises.

*Bleeker*, in reply, contended, that no entry could be effectual to avoid a fine but by a person having right.§ A fine can be avoided only by reversal in error, by pleading, or by averment of fraud. It was not necessary that any person should be in possession at the time the fine was levied, it being a conveyance of record.|| It is valid until duly avoided. If the land was vacant, the effect must be to put the cognizee in possession according to his right. The saving of the act is only to persons having right, and the defendant does not show a right.

\*PLATT J., delivered the opinion of the Court. Levying a

A fine, and five years non-claim, are conclusive evidence of title in the cognizee, a-  
[ \* 427 ]

gainst all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered during the five years, without title.

† 5 Cruise's Dig. 120. (Fine,) 3 Co. 78. b.

‡ 5 Johns. Rep. 59. 63, 64.

§ 5 Cruise's Dig. 233. 242 Tit. 35. Fine. Bracton, 436. b. Dyer, 215. b.

|| 5 Cruise, 137. 140.

[ \* 428 ]

NEW-YORK,  
Oct. 1816.

BIGELOW  
v.  
JOHNSON.

fine at common law, and as regulated by statute, is a *judgment of the Court* upon the agreement of the parties, which not only transfers the right of the vendor, and all claiming under him, but also extinguishes the rights of all others who omit to make their claim in due season. (*Cruise's Dig. tit. Fine.*)

Lord Coke likens it to a sale of personal property in *market overt*, which is not only good and valid between the contracting parties, but is, also, binding on all strangers who have any right to the things sold. (2 *Inst.* 713.) At common law, all persons were concluded, unless they made claim during the process of levying the fine. (*Bract.* 436. A. & B. 5 *Cruise's Dig.* 121.) But in the reign of Edward I., the law was altered so as to allow a year and a day to all persons to claim, in order to avoid a fine. Our statute allows *five* years to claim against a fine; and expressly affirms the common law, in declaring that a fine levied pursuant to the forms regulated by the statute, "*shall be a final end, and conclude, as well privies, as strangers to the same,*" excepting persons under disabilities, &c. It operates, not merely as a shield to a person in possession under a doubtful title, but as an absolute conveyance, or investment of title, *per se*, after five years' acquiescence.

This fine must, therefore, be conclusive against the defendant, for although he entered within five years, yet he has shown no title in himself; and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

### BIGELOW *against* JOHNSON.

In an action on the 7th section of the act [*\* 429*]

to lay a duty on strong liquors, (1 *R. L.* 178.)

(a) where the offence charged in the declaration is the selling of strong or spirituous liquors without a license, contrary to the first clause in that section of the statute, the plaintiff cannot proceed for the offence specified

in the subsequent clause, viz. selling liquors to be drank in the house of the seller without entering into a recognizance. (b)

Where a penal statute gives no form of declaring, the plaintiff must set forth specially the facts which constitute the offence. (c)

IN ERROR on *certiorari* to a justice's Court.

*Johnson*, the defendant in error, brought an action of debt, in \*the Court below, against the plaintiff in error, and declared generally for the penalty of twenty-five dollars, for selling strong and spirituous liquors, contrary to the 7th section of the act to lay a duty on strong liquors, &c. The plaintiff, being called upon for the particulars of his charge, specified certain small quantities of liquors sold to particular persons: the defendant then pleaded the general issue, and at the trial the plaintiff proved his specific charges, and, also, that the liquor so purchased was immediately drank by the purchasers in the defendant's store. The defendant produced in evidence, and relied upon it as his defence, a regular license from the commissioners of excise, permitting him to retail spirituous liquors

(a) 1 *R. S.* 680.

(b) *Smith v. Brown*, 1 *Wendell's Rep.* 231.

(c) *Cole v. Smith*, 4 *Johns. Rep.* 193. *Collins v. Ragrew*, 15 *Id.* 5. *Barlett v. Crozier*, 17 *Id.* 438.



under five gallons. The justice overruled this defence, and gave judgment for the plaintiff below for the penalty demanded, with costs.

NEW-YORK,  
Oct. 1816.

BALDWIN  
v.  
PROUTY

*Per Curiam.* The 7th section of the act provides "that if any person shall sell by retail any strong or spirituous liquors, without having a license, or if any person shall sell any strong or spirituous liquors, to be drank in his or her house, outhouse, yard, or garden, without having entered into a recognizance, every person who shall be guilty of either of the offences aforesaid, shall, for each offence, forfeit the sum of twenty-five dollars." Here are two distinct offences described, viz. one of selling by retail without license, and the other, selling liquor to be drank in the house, &c., without recognizance.

It is a well-settled rule, that, in declaring for offences against penal statutes, (where no form is expressly given,) the plaintiff is bound to set forth specially the facts on which he relies to constitute the offence. No form is prescribed by the statute in this case; and the plaintiff here declared against the defendant for selling spirituous liquors by retail to A. and B., contrary to the 7th section of the act. This declaration does not embrace the offence of selling liquors to be drank in the house, &c., without recognizance; or, at least, it is equivocal. The defendant was not apprized that the latter offence would be charged against him; and as to the first offence, his license was a complete answer.

Judgment reversed.

---

**\*BALDWIN against PROUTY.**

[ \* 430 ]

IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error, who was defendant in the Court below, pleaded, by way of set-off, a judgment recovered by him against the plaintiff below, before another justice; and the plaintiff having, at the trial in the Court below, proved his demand, the defendant, in support of his set-off, offered to prove, that the justice, before whom the judgment in his favor was obtained, was dead; and also offered the original minutes of that judgment, in the hand-writing of the justice, with proof to verify those minutes; but this evidence was excluded, and judgment was given in the Court below for the defendant in error, for the whole amount of his claim.

It is sufficient evidence of a judgment recovered before a justice of the peace who is since dead, for the party to prove the death of the justice, and to produce the original minutes of the judgment, in the hand-writing of the justice, with proof to verify those minutes.

*Per Curiam.* The judgment was a good ground of set-off; and the evidence offered of the existence of that judgment was the best that the nature of the case would admit. The justice, therefore, erred in rejecting the evidence, and the judgment ought to be reversed.

Judgment reversed.

NEW-YORK,  
Oct. 1816.

# DORR against MUNSELL.

DORR  
v.  
MUNSELL.

In an action  
of debt on bond,  
the defendant  
cannot read a

on-  
or  
in-  
ive

y a  
rep-  
of

if a  
af-  
ned

ere  
ara-  
ond

refer  
ight  
the

was  
as  
in-

may  
ev-  
nder

...a est factum,  
only where it  
relates to the  
execution of the  
instrument. (a)

THIS was an action of debt on a bond in the penalty of 400 dollars, dated the 21st *September*, 1810. The defendant craved oyer, and set forth the condition of the bond, which was for the payment of three sums, each of 66 dollars and 67 cents, in one, two, and three years from the date; and then pleaded, 1. *Non est factum*. 2. That the bond was fraudulently obtained by the plaintiff, by representing himself to be the original inventor and patentee of an improvement in a machine for shearing \*cloth, containing a new mode and principle of drawing and moving the cloth in the machine while in the operation of being sheared; and that the same had not been invented by, or patented to, any other person previous to the date of the letters patent granted to the plaintiff by the president of the *United States*. The defendant then averred that the said mode of drawing cloth, while in the operation of being sheared, was patented on the 22d *November*, 1805, to one *Kellogg*, and to one *Samuel G. Dorr*, on the 29th *October*, 1792; and that the defendant was not the original inventor and patentee thereof. That the defendant, in confidence of the representations of the plaintiff, made the bond in the declaration mentioned, and received therefor, from the plaintiff, a conveyance of his right to make and use the said machine for 14 years, in the county of *Cayuga*, and in the township of *Marcellus*, in the county of *Onondaga*, excepting the town of *Aurelius*, in the county of *Cayuga*. 3. Generally that the bond was obtained by fraud. To the second plea the plaintiff demurred, and assigned special causes of demurrer, which it is unnecessary to state, as the opinion of the Court was founded on the insufficiency of the plea in substance; and, to the third plea, he replied tendering an issue thereon. The cause was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court. The plea demurred to is bad. It sets up a fraudulent representation of the plaintiff's patent right; and, in substance, it is a denial of any consideration for the bond. At law, the defendant cannot avoid a solemn deed on the ground of a want of consideration. That inquiry is precluded by the very nature of the instrument. The case of *Vroman v. Phelps* (2 *Johns. Rep.* 177.) is directly in point, that a fraudulent representation of the quality and value of the thing sold forms no defence in a suit on a specialty.

In some of the elementary writers, it is stated that fraud may be given in evidence under the plea of *non est factum*. This must be confined to cases where the fraud relates to the execution of the instrument, as if a deed be fraudulently misread, and

(a) *Stephens v. Judson*, 4 *Wendell's Rep.* 473. *Dale v. Roosevelt*, 9 *Conn. Rep.* 307. *Jackson v. Hills*, 8 *Ibid.* 230. *Franchot v. Leach*, 6 *Ibid.* 806. *Van Valkenburg v. Rout*, 12 *Johns. Rep.* 337.

is executed under that imposition; or where there is a fraudulent substitution of one deed for another, and the party's signature is obtained to a deed which he did not intend to execute. The case of *Hayne v. Maltby* (3 Term Rep. 440.) does not apply. There \*the suit was on the covenant which was the instrument of the fraud, and Lord *Kenyon* evidently meant to exclude the idea that the defence would have been admitted, had there been a covenant to pay a sum in gross.

NEW-YORK.  
Oct. 1816.

BANK OF  
UTICA

v.  
DE MOTT.

[ \* 432 ]

Judgment for the plaintiff.

### THE PRESIDENT, &C. OF THE BANK OF UTICA *against* DE MOTT.

THIS was an action of assumpsit against the defendant, as endorser of a promissory note. The cause was tried at the last *Oneida* circuit.

The note on which the action was founded was drawn by one *William Low* for 375 dollars, and payable to the defendant or order, at the *Bank of Utica*, one hundred and twenty days after date, and was dated the 6th Dec. 1814. There was no town or place mentioned in the note where it purported to have been made. The note not being paid on the day on which it became payable, it was proved, by a book-keeper in the *Bank of Utica*, that, on the evening of the same day, he put the usual notice to an endorser into the post-office at *Utica*, directed to the defendant, at *Canandaiqua*, where, from the best information he could get, he supposed the defendant resided. The witness also stated that he inquired of the cashier and some of the directors as to the place of residence of the defendant, and that he was in the habit, in all cases where the place of residence of the endorsers of a note was uncertain, of making inquiries of such persons as he supposed were best acquainted with their place of residence; that, on this occasion, also, he found in the bank a cancelled note drawn by the same *Low*, and endorsed by the defendant, which note was dated at *Canandaiqua*, and the body of it in the hand-writing of a person whom he knew resided at *Canandaiqua*, but the note offered in evidence was not in the hand-writing of the same person. Neither the maker of the note nor the defendant had ever lived in *Utica*, and it did not appear that the defendant had ever admitted that he had received notice. \*The defendant proved that he resided at *Ovid*, in the county of *Seneca*, and had lived there for ten years past: the maker of the note also lived at *Ovid*, at the time when it was given.

Where the endorser of a promissory note resides in a different place from that in which it is payable, notice of the non-payment must be sent to him in the place in which he is actually resident, and, if directed to a wrong place, without showing that due diligence was used to ascertain his residence, but without success, he will be discharged. (a)

[ \* 433 ]

The jury found a verdict for the plaintiff for the amount of the note, with interest, subject to the opinion of the Court on

(a) Vide *Croder v. Nellis*, 4 Wendell's Rep. 398. *Bank of Utica v. Phillips*, 3 Ibid. 408. *Reid v. Payne*, 16 Johns. Rep. 218.

NEW-YORK, Oct. 1816. the foregoing facts. The case was submitted to the Court without argument.

PALMER  
V.  
HAND.

SPENCER, J., delivered the opinion of the Court.

The defendant is sued as endorser of a promissory note, payable at the *Bank of Utica*. When the note fell due, notice of its non-payment was given, by a letter put into the post-office at *Utica*, directed to the defendant, at *Canandaigua*. It was proved that the defendant lived at *Ovid*, in the county of *Seneca*, and had resided there for ten years past. The excuse for the misdirection of the notice is, that the book-keeper, who gave it, was informed, by the cashier and some of the directors of the bank, that the defendant resided at *Canandaigua*.

The notice is bad. The defendant was entitled to information of the non-payment of the note, and that he was looked to for payment. He had a permanent residence, for ten years, in a different county. With ordinary diligence, the place of his abode might have been ascertained; and it must be the plaintiff's loss, not the defendant's, that the notice was not given. It is an essential part of the contract, that the endorser shall be notified of the non-payment of the note, that he may take measures accordingly; and if any loss has happened from the want of notice, it must be borne by the party on whom the burden of giving due notice is thrown by law, and who has been guilty of laches.

The case of *Chapman v. Lipscombe & Powell* (1 Johns. Rep. 294.) was peculiarly circumstanced. There was great diligence used in that case to find out the defendant's residence, and the bill was dated at *Norfolk*, to which place one of the notices was directed. Here the note was not dated at any place, and the inquiry was very limited.

Judgment for the defendant

[ \* 434 ]

\*PALMER against HAND.

Where goods are sold to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods.

And if, during the delivery,

and before it is completed, the purchaser sells, or pledges them to a third person, for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser. (a)

THIS was an action of trover, tried before Mr. Justice *Spencer*, at the *Albany* circuit, in *April*, 1816.

The plaintiff was the owner of a raft, consisting of plank, joist, and boards; and whilst coming down the *North River*, in the autumn of the year 1815, with the raft, one *Potter* came upon the raft, and offered to buy it: the price was agreed upon: it was also agreed, that the plaintiff should deliver it at one of the docks in *Albany*, and be at the expense of taking it out of the water. *Potter* then applied to the defendant, who kept a lumber-yard, in *Albany*, to purchase the lumber which the plain-

(a) Vide *Jennings v. Webster*, 7 Cow. Rep. 236. *Chapman v. Lathrop*, 6 Ibid. 110. *Furniss v. Hone*, *Wendell's Rep.* 247. *Lupin v. Marie*, 6 *Wendell*, 71. *Haggerty v. Palmer*, 6 *Johns. Ch. Rep.* 451.

tiff had agreed to sell him; but *Potter* and the defendant not being able to settle the bargain, it was agreed that the defendant should take and sell the lumber. The plaintiff arrived with his raft, the next day, and brought it to the defendant's dock, and there inquired of one of the witnesses in the cause for *Potter*, and asked if *Potter* was not to have more hands to take out and pile the lumber, and said that he had sold it to *Potter*. He then left the raft, and went into the city, and at 4 o'clock in the afternoon, at which time all the raft was taken out of the water, and nearly all piled, a few culling pieces excepted, the plaintiff returned and forbade any more to be piled, saying that *Potter* had gone off. The defendant, on the same day, advanced to *Potter*, on account of the deposit of lumber, 100 dollars; and also gave him an order on *Wilder & Hustings*, for 150 dollars, in goods, which were, in the evening of the same day, delivered to him. There was no formal delivery of the lumber to *Potter*, who, it was conceded, was a cheat, and had absconded. The plaintiff proved a demand on the defendant to restore the lumber, or pay for it, and a refusal. The jury found a verdict for the plaintiff, subject to the opinion of the Court, on a case containing the above facts.

NEW-YORK.  
Oct. 1816.

PALMER  
v.  
HAND.

*Van Vechten*, for the plaintiff, cited *Roberts on Frauds*, 165, 166, 167. 169. 1 *Mod.* 137. 2 *Caines's Rep.* 44. 2 *Johns. Rep.* 17. 3 *Johns. Rep.* 399. 6 *Term Rep.* 54. 7 *Term Rep.* \*66. 440. 3 *Term Rep.* 469. 3 *Bos. & Pull.* 232. 3 *East*, 99. 2 *Term Rep.* 71. 3 *Caines's Rep.* 185.

[ \* 435 ]

*Henry*, contra.

PLATT, J., delivered the opinion of the Court. This is an action of trover, for a quantity of plank and scantling. It appears that the plaintiff was owner of a raft of lumber, and while descending the river opposite to *Lansingburgh*, he contracted with one *Potter* for the sale of the lumber, to be delivered to *Potter*, by the plaintiff, on one of the docks, in *Albany*, at a price agreed on, to be paid on delivery. *Potter* then went to the defendant, who keeps a lumber-yard and dock, at *Albany*, and agreed to deliver to him the lumber of that raft, to be sold by the defendant, on commission, for *Potter*.

Next morning, about sunrise, the plaintiff arrived with the raft, and fastened it to the defendant's dock. The plaintiff then told the workmen employed there, that he had sold the lumber to *Potter*. One or two men began immediately to pile the plank, &c., on the defendant's dock, and the plaintiff "asked if *Potter* was not to have more hands to take out and pile the lumber." The plaintiff then went into the city, and did not return again till 4 o'clock P. M., at which time the lumber was almost all piled on the defendant's dock. The plaintiff then forbade the piling of any more, saying that *Potter* had absconded.

While the men were piling up the lumber, about 10 or 11

NEW-YORK,  
Oct. 1816.

PALMER  
V.  
HAND.

o'clock A. M. of that day, the defendant advanced to *Potter* 100 dollars, and, also, gave an order for 150 dollars' worth of goods, in favor of *Potter*, on account of the deposit of lumber. The plaintiff, afterwards, demanded the lumber, which the defendant refused to deliver.

There is no doubt that, upon a contract to sell goods, where no credit is stipulated for, the vendor has a *lien*; so that if the goods be actually delivered to the vendee, and, upon demand then made, he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was *conditional*.

As between the *vendor* and *vendee*, in this case, I incline to the opinion that the property in the lumber was not so vested in the *vendee* as that the vendor could not legally have resumed it \*when he came, in the afternoon, and forbade the piling of any more of it.

[ \* 436 ]

The contract with *Potter* was for the *whole raft*, to be delivered on the dock. The *vendor*, therefore, had no right to demand payment for any part until the whole was delivered; and it appears that he came to the place of delivery, at 4 o'clock in the afternoon of the day on which the raft arrived at the dock, whilst the lumber was still in the course of delivery, and signified his determination not to consider the sale as *absolute*. He said that *Potter* had absconded, and ordered the men not to pile any more of the plank, &c. As between *Palmer* and *Potter* there was no such delay or acquiescence on the part of the vendor, as would be evidence of a *credit given for the money*. If the vendor was there, and demanded payment, as soon as the whole lumber was piled on the dock, that was enough to preserve his *lien*; and such, I think, is the fair construction of the evidence.

The plaintiff, in this case, seeks to enforce his *lien* against a person who has *bona fide* received the property as a pledge for money and goods advanced to *Potter*, to nearly the amount of its value. Those advances were made by the defendant while the lumber was in a course of delivery on the dock, and before the plaintiff asserted his claim to it. But there is no evidence that the plaintiff had any knowledge of the negotiations between *Potter* and the defendant, in regard to the lumber, until after the plaintiff had made his election to rescind his contract with *Potter*. This is a contest, then, between two honest men, who shall be the dupe of a swindler. The strict rule of law must, therefore, be applied; and the defendant cannot be allowed to stand in a more favorable situation than *Potter* would have been in if he himself had withheld the possession of the lumber, without paying the price when demanded.

We are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

\*THE PEOPLE *against* DUNLAP.

THIS was an action of debt on an administration bond against the defendant, as surety. The declaration stated that the defendant, together with *Anne Dunlap* and *William Harrowell*, did, on the 8th of *February*, 1798, by his certain writing obligatory, acknowledge himself bound to the people of the state of *New-York*, in the sum of 550 dollars; the condition of which bond was, among other things, that, if the said *Anne Dunlap*, administratrix of *Samuel Dunlap*, deceased, did make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, and credits, of the deceased, and exhibit, or cause it to be exhibited, into the office of the surrogate of the county of *Montgomery*, at or before the expiration of six months from the date of the bond, and the goods, chattels, and credits, of the deceased, should well and truly administer, according to law, and should, when requested, make, or cause to be made, a just and true account of administration, then the obligation to be void. The breaches assigned were, that *Anne Dunlap* had not made an inventory and exhibited the same within six months, into the office of the surrogate, and had not well and truly administered, according to law, the goods, &c., of the deceased, but that goods, chattels, and sums of money, of the deceased, to a large amount, to wit, the amount of 500 dollars, had come into her hands, which she had converted and disposed of to her own private use and benefit, and had neglected and refused to pay the just debts of the deceased, and particularly a judgment obtained against the administratrix in favor of one *Samuel Dickson*, as hereinafter mentioned. And the plaintiff assigned for further breach, that the intestate, being indebted to *Samuel Dickson*, in the sum of 100 dollars, brought an action against the administratrix in the Court of Common Pleas of *Montgomery* county, wherein the defendant pleaded *plene administravit*, and on the trial in that Court, in *January* term, 1813, a judgment was given in favor of the plaintiff, for 53 dollars and 78 cents, to be levied of the goods and chattels which were of the intestate, at the time of his death, in the hands of his administratrix, to be administered; on which judgment a *fi. fa.* was issued to the sheriff of *Montgomery*, to levy of the goods and chattels of the intestate, which was returned *nulla bona*; and the plaintiffs averred that that judgment remained unsatisfied, and that divers goods and chattels of the intestate came into the hands of the administratrix more than sufficient to satisfy the judgment, to wit, of the value of 500 dollars, yet the administratrix did not well and truly administer the same, and did not pay the judgment of *Dickson* with the avails of the goods, &c., but converted the same to her own use.

The defendant, having craved oyer of the condition of the bond, and set it forth, pleaded, as to the breach for not exhibiting

NEW-YORK,  
Oct. 1816.

THE PEOPLE  
v.  
DUNLAP.

In an action against the surety on an administration bond, it is sufficient for the plaintiff to state that goods, chattels and sums of money, of the deceased, to a large amount, to wit, the amount of, &c., had come into the hands of the administratrix, which she had converted and disposed of to her own use, &c., the creditor not being presumed to know precisely what goods, &c., the administratrix had, and this fact lying more properly in the knowledge of the defendant.

The non-payment of a judgment obtained against the administratrix may be assigned as a breach of the condition of such a bond.

The surety in an administration bond is liable for a mal-administration of the effects of the deceased, and the condition of the bond is not to be restricted merely to the

[\* 438] exhibiting of an inventory with in six months from the date, into the office of the surrogate of the county.

And such bond may be put in suit against the sureties at the instance, and for the benefit, of a creditor.

NEW-YORK,  
Oct. 1816.

THE PEOPLE  
v.  
DUNLAP.

an inventory within six months, that an inventory had been made and exhibited; and, as to the other matters in the declaration contained, specially assigned for causes of demurrer, that it did not appear by the declaration that the defendant had ever been cited to render an account of her administration before the surrogate of *Montgomery*, or the Court of Probates; and that the declaration did not state, with sufficient certainty, wherein the defendant had neglected to administer, and that the plaintiffs had alleged the non-payment of the judgment in the declaration mentioned, as one of the breaches of the condition of the bond.

The plaintiffs replied, taking issue on the defendant's plea, and joined in demurrer.

*C. M. Lee*, in support of the demurrer, contended, 1. That the assignment of the breach, as to the converting of goods and chattels, &c., by the administrator, to his own use, amounting to 500 dollars, &c., was too general and indefinite for the defendant to take issue thereon. The nature and kind of goods, &c., ought to have been particularly specified.†

2. That the non-payment of the judgment debt to *Samuel Dickson* was improperly assigned as a breach. The payment of debts is no part of the condition of the bond, which is merely for a due delivery to the surrogate of a true inventory or account.‡

3. That a *devastavit* cannot be assigned as breach of the bond.

*Talcot*, contra, insisted, that if there was any defect in the assignment of the first breach, it was matter of form, and ought to be taken advantage of by a special demurrer. What goods or chattels have been taken and applied to his own use, must be known to the defendant, but the plaintiff or relator cannot be supposed to have that knowledge.§

As to the other objections; it is true, that Lord *Holt*, in the case of the *Archbishop of Canterbury v. Wills*,|| said, that the creditor shall not take an assignment of the bond, and assign for a breach the non-payment of a debt to him, or a *devastavit*; and that the words "well and truly administer" are to be construed the bringing in the account by the administrator. This is the case relied on by *Toller*, and is referred to in *Bacon's Abr.*¶ as deciding merely that executors are not, of themselves, bound to take notice of debts. In the case in *Lutwyche*, of the *Archbishop of Cant. v. Brown*, there was a demurrer to the replication; and the report of the case contains nothing but the pleadings, with a note, that judgment was given for the plaintiff, which was afterwards reversed in the exchequer chamber, on the ground that the non-payment of a debt was not a breach within the condition of the bond. There is no discussion of the law on the subject.

In the case of the *People v. Pease*,†† which was an action on an administration bond, the breach assigned was a *devastavit*

† *Cro. Eliz.*  
137. 2 *Lev.* 179.  
195. 2 *Ventris*,  
174. 262. 2  
*Baund.* 379.

‡ *Toller's Law*  
of Exec'rs. 495,  
496. *Comyn's*  
*Dig. Adm.* (C.  
3.) *Lutw.* 882.  
1 *Salk.* 316. 4  
*Burns's Eccl. L.*  
428. 430. 443.  
*Cowp.* 140. 3  
*Atk.* 248.

[ \* 439 ]

§ *P. M. G.*  
of *U. States v.*  
*Cochran*, 2  
*Johns. Rep.* 413.

|| 1 *Salk.* 315,  
316

¶ *2 Bac. Abr.*  
*1d edit.* 409.

†† 2 *Johns.*  
*Cases*, 376.



and the objection that such a breach could not be assigned, appears never to have been made. In the Courts of other states, where actions have been brought on similar bonds, for the benefit of creditors, no doubt has been entertained that the suit would lie in case of a *devastavit*.†

*Lee*, in reply, said that, as to the cases decided in the Courts of other states, it did not appear that they had similar statutes on the subject. Our statute (1 *N. R. L.* 444. 448. *sess.* 36. *ch.* 79. *s.* 11, 12.) (a) gives another and effectual remedy. The judge of the Court of Probate, or surrogate, has power to call administrators to account, and to compel them to settle and make distribution of the intestate's estate; and in case of neglect, or refusal to perform what is required of them, they may be imprisoned. In the state of *Massachusetts*, a creditor was expressly authorized, by statute, to bring an action on the bond, in such case.

SPENCER, J., delivered the opinion of the Court.

The defendant's counsel have made three objections to the declaration.

\*1. That the breach, in stating that goods, chattels, and credits, of the deceased, to the value of 500 dollars, have come to the hands and possession of the administratrix, is bad, in not setting forth the kind of goods specially;

2. That the non-payment of the judgment cannot be assigned as a breach of the condition; and,

3. That no action can be maintained for not duly administering the goods and chattels of the intestate.

As to the first point; in trespass or trover, it is necessary, undoubtedly, to state, with sufficient certainty, the goods taken, or converted; but in these cases, the plaintiff is presumed to know his own goods, and the particulars of those for which he sues. In the present case, the plaintiff is not to be presumed to have knowledge of the goods, chattels, and credits, of the intestate. In looking into precedents† of replications to the plea of *plene administravit*, I have not met with an instance in which the goods are specially mentioned. They are all general, "that the executor or administrator had divers goods and chattels which were of the deceased, at the time of his death, in the hands of the representative to be administered, of great value, to wit," &c. There is no reason why a declaration founded on the mal-administration of the administrator should be more special than a replication to a plea of *plene administravit*. I consider the true reason why the amount need not be precise to be, that the creditor, not being presumed to know precisely what goods and chattels the executor or administrator had, may state, generally, that he had them of great value; the fact alleged lying more properly in the knowledge of the defendant than the plaintiff.§

NEW-YORK,  
Oct. 1816.

THE PEOPLE  
v.  
DUNLAP.

† 1 *Wash.*  
*Rep.* 31. 9 *Mass.*  
*Rep.* 114. *per*  
*Scwell, J. Id.*  
119. 370. 1 *Bay's*  
*Rep.* 328.

[ \* 440 ]

§ 3 *Chitty*,  
609.

§ 3 *Eas.*  
*Rep.* 85. 8 *Term*  
*Rep.* 459. 2  
*Saund.* 411. *in*  
*notie.*

(a) 2 *R. S.* 92. *et seq*

NEW-YORK,  
Oct. 1816.

THE PEOPLE  
v.  
DUNLAP.

The second point does not strike me with any force; I think it proper to state in the breach, the debt actually unpaid, and for which the suit is brought. No reason has been assigned against this, and its propriety is manifest: the judgment set forth ascertains the debt in a conclusive manner, and the sheriff's return of *nulla bona* on the execution, is evidence that there were no goods or chattels of the intestate, out of which the same could be satisfied.

As to the third point; Lord *Holt* is made to say, in the case of the *Archbishop of Canterbury v. Wills*, (1 *Salk.* 316.) that though, by the words of the condition, the administrator is to administer well and truly, that shall be construed in bringing his account, \*and not in paying the debts of the intestate, and, therefore, a creditor shall not take an assignment of the bond, and sue it, and assign for a breach the non-payment of a debt to him, or a *devastavit* committed by the administrator, for that would be needless and infinite. This case is referred to by the elementary writers, almost exclusively, to maintain the proposition that a creditor of the intestate cannot cause the administration bond to be put in suit for not well and truly administering. I do not believe that to be the law now, even in *England*. In the case of the *Archbishop of Canterbury v. House*, (*Courp.* 140.) a suit was brought upon such a bond at the instance of a creditor, and by the consent of the archbishop, and the very point was taken, on a motion to stay proceedings, that he could not authorize a creditor to put the bond in suit, but only the next of kin. Lord *Mansfield*, after stating the condition of the bond, and that it was agreed that the ordinary might permit his name to be used at the instance of the next of kin, says, "In like manner, if such application is made by a creditor, I see no reason why he should not have the same privilege; and I know of no authority which says that the ordinary cannot empower him to put the bond in suit; it is *ex debito justitiæ* that he ought to do so; for though a creditor has no concern in the latter part of the condition, namely, the distribution of the surplus money among the next of kin, yet he is most materially and principally interested in the administrator's delivering in a true inventory, and in the due administration of the effects;" and all the judges concurred in refusing the motion. In the case of *Greenside and others v. Benson and others*, (3 *Atk.* 248.) Lord *Hardwicke* sanctioned a writ and judgment upon a bond of administration, at the instance of a creditor, and made it the basis of his decree. Our statute (1 *N. R. L.* 447. s. 10.) (a) requires the judge of probate, and the surrogates, upon granting administration, except in certain specified cases, to take of the person, to whom administration shall be granted, *sufficient bonds* to the people of this state, with two or more competent sureties, in such penalty as such judge or surrogate shall think reasonable, *respect being had to the value of the estate*. The condition prescribed is,

(a) 2 *R. S.* 77.

among other things, *well and truly to administer, according to law, the goods, chattels, and credits, of the deceased*: the same section provides, in case the bond shall become forfeited, that it shall be lawful for the judge of probate, or surrogates, granting administration, \*to cause the same to be prosecuted, *at the request of the party grieved by such forfeiture.*

The question recurs—What is a forfeiture of the bond? Most certainly, an unfaithful administration of the estate of the intestate, in not applying the goods, chattels, and credits, of the deceased to the payment of his debts: the law enjoins it on an executor or administrator to collect the estate of the testator or intestate, to convert it into money, to pay the funeral expenses first, then the debts he owed, and then legacies; after which, in case of intestacy, the residue is to be distributed among the next of kin, according to the statute. A conversion of the effects of the intestate to the private use of the administrator, leaving the debts unpaid, is a violation of the trust reposed in the administrator, and a breach of the condition of the bond in not administering the goods, chattels, and credits, according to law. And we have seen that the judge of probate, or surrogate, in case the bond becomes forfeited, may, at the request of the party aggrieved, cause the bond to be prosecuted; and a creditor of the intestate is a party emphatically aggrieved by a mal-administration of the estate, by which he has lost the means of getting his debt paid. How it could ever have entered the mind of any person, that the condition of such a bond was satisfied by merely exhibiting an inventory within six months, is to me very extraordinary.

The penalty of the bond, and the sufficiency of the sureties, are to be taken in reference to the value of the estate of the intestate, and it is made a distinct and substantive part of the condition that the estate, thus committed to the administrator, shall be administered according to law; and, undoubtedly, one of the primary objects of the legislature, in authorizing the granting of administration, and taking a bond, was to secure the payment of debts due the intestate. And yet, we are told, the condition is performed by the mere act of exhibiting an inventory, so far as respects the sureties. It is true the surrogate has power to call the administrator to account, and to make distribution, after the debts, funeral charges, and all expenses, are first allowed, and he may coerce obedience by imprisonment; but the surrogate has no jurisdiction over the sureties in any other way than by directing their bond to be sued. All this is no satisfaction of a creditor's debt, and in case of the wasting the estate, and the insolvency of the administrator, the creditor is remediless, \*unless he can obtain a remedy on the bond against the sureties. I have not the least doubt but that, upon a just construction of the condition of the bond, in reference to the requisition of the statute, as to the manner of taking it, and the authority to cause it to be sued at the request of the party aggrieved, the sureties

NEW-YORK,  
Oct. 1816.

THE PEOPLE  
v.  
DUNLAP.

[ \* 442 ]

[ \* 443 ]

NEW-YORK,  
Oct. 1816.

SUYDAM AND  
WYCKOFF  
v.  
KEYS.

are answerable for the wasting of the estate by the administrator, and the non-payment of the debts of the intestate, if there be assets.

Were it necessary to cite authorities in support of this construction, it will be seen that my view of the case is sanctioned by the cases in 9 *Mass. Rep.* 117. and in 1 *Wash. Rep.* 31.

The plaintiff must have judgment on the demurrer.

Judgment for the plaintiff.

### BUTTERWORTH *against* SOPER.

In an action of trespass against an officer of the militia, who has issued a warrant for collecting a fine for delinquency, pursuant to the order of a regimental court-martial, the defendant cannot give this special matter in evidence as a justification, under the general issue. (a)

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action of trespass in the Court below against the plaintiff in error, and declared, for that he had, without authority, issued a written order, commanding a constable to levy a fine for the delinquency of the son of the plaintiff below, as a soldier in the militia; in pursuance of which order, the constable took and sold the cow of the plaintiff. The defendant below pleaded the general issue, and the plaintiff having proved his declaration, the defendant offered to prove that he issued the warrant for collecting the fine, in pursuance of the sentence of a regimental court-martial. The plaintiff objected that this justification was inadmissible under the general issue, and the justice gave judgment for the plaintiff below.

*Per Curiam.* There is no error, and the judgment must be affirmed. The statute† authorizing such defence under the general issue, does not extend to this case.

Judgment affirmed.

† See act for the more easy pleading in certain suits, 1 *N. R. L.* 155. sect. 1.

(a) Vide *Marsh v. Borry*, 1 *Cow. Rep.* 344. *Demick v. Chapman*, 11 *Johns. Rep.* 132.

{ \* 444 }

### \*SUYDAM AND WYCKOFF *against* KEYS.

Persons not inhabitants of a town, are not liable to be taxed for the support of common schools in that town. (b) (1 *N. R. L.* 261.) and if a tax be assessed,

and levied upon the property of such non-resident, not only the trustees, who issue the warrant, but also the collector, who executes it, are trespassers. The trustees having but a special and limited authority, the officer is bound to see that he acts within the scope of their legal powers.

But an officer may justify under erroneous proceedings, where there is no defect of jurisdiction. (c)

(b) *Dubois v. Thorne*, 8 *Wendell*, 518. Vide *Ryder v. Cuddeback*, 12 *Johns. Rep.* 412.

(c) Vide *M<sup>r</sup> Guinty v. Herrick*, 5 *Wendell's Rep.* 240. *Saracool v. Broughton*, *Ibid.* 170. *Wattles v. Marsh*, 5 *Cow. Rep.* 176. *Cable v. Cooper*, 15 *Johns. Rep.* 152. *Adkins v. Brewer*, 3 *Cowen*, 206.

The plaintiffs were the owners of mills, and other property, in the town of *Munroe*, where their business was conducted by an agent, but they actually resided in the city of *New-York*. The agent of the plaintiffs had, before the sale of the flour, sold to the defendant timber, which was applied towards building the school-house, and at the time of the sale the defendant credited the plaintiffs with the price of the timber on the assessment, and sold the flour for the balance, which was twenty-five dollars. The agent of the plaintiffs forbade the sale, and denied the justice of the demand. The defendant justified under the warrant, before mentioned, under the hands and seals of the trustees of the said school district, directing him to collect from each of the inhabitants of the district the several sums of money written opposite to their names in the tax-list annexed to the warrant, and, in case of neglect or refusal, to levy on the goods and chattels of the delinquent. The jury found a verdict for the plaintiffs for forty dollars, subject to the opinion of the Court on the above case.

NEW-YORK,  
Oct 1816.

SUYDAM AND  
WYCKOFF  
V.  
KEYS.

*Ross*, for the plaintiffs, contended, that no person but a resident inhabitant of the district was liable for the school-tax, under the act, (35 sess. ch. 242. s. 8. 1 *N. R. L.* 261.) (a) Though the plaintiffs had real estate in the district, the tax was no *lien* on the land.

The levying of this tax being illegal, and there being a want of jurisdiction, the parties concerned in the collecting of the tax are trespassers.†

† *Smith v. Shaw, 12 Johns. Rep. 267.*

*Storey*, contra, insisted, that admitting the assessment to have been improperly made, yet the defendant was not liable to this action. In *Henderson v. Brown*,‡ this Court decided that trespass \*would not lie against an officer for executing a warrant of distress, though the assessment was erroneous.

‡ 1 *Caines's Rep. 92.*

[ \* 445 ]

As to the principal point, he urged that the plaintiffs, though not actually residing within the district, yet having property there, were liable to the assessment under the act. Sir *Edward Coke*, in his commentary on the 22 *Hen. VIII. c. 5.* relative to the repairs of bridges, by the inhabitants of the shire, says, that as to the words "inhabitants of the said shires," that though a man dwells in a foreign county, or town, yet if he has lands or tenements in his own possession or manurance in the county where the decayed bridge is, he is an inhabitant within the meaning of the statute; so, if a man dwelleth in a foreign shire, or town, and keeps a house and servants in another shire, or town, he is an inhabitant in each shire, &c., within the statute: *Habitatio dicitur a habendo*, &c. And he gives the same construction to the word *inhabitants*, in *Jeffrey's case*,§ relative to the poor rates. So, in *Leigh v. Chapman*,|| Chief Justice *Hale* gave the same construction to the word, in a case arising under the statute of hue and cry; and in *Atkins v. Davis*,¶ the pro-

§ 3 *Co. 66, 67.*

|| 2 *Saund. Rep. 423.*

¶ *Culdecot's cases, 315.*

(a) 1 *R. S. 478.*

NEW-YORK,  
Oct. 1816.

STUDAM AND  
WICKOFF  
v.  
KEYS.

prietors of the *London* bridge water-works, who had only their offices, wheels, and works, within the ward in which they had been assessed, under the statute of 27 *Eliz.* ch. 13. s. 5., were adjudged, in the exchequer chamber, to be inhabitants of the ward, on the authority of Lord *Coke* and Lord *Hale*.

PLATT, J., delivered the opinion of the Court. This is an action of trespass, for taking four barrels of flour from the mill of the plaintiffs, in the town of *Munroe*, in *Orange* county.

The defence is a justification, by virtue of a warrant under the hands and seals of the trustees of the school district, (which included the mills of the plaintiffs,) for collecting a tax which had been voted by the freeholders and inhabitants of the district, for the purpose of building a school-house, according to the provisions of the 8th section of the act for the establishment of common schools. (1 *N. R. L.* 261.) (a)

By that section of the act, the freeholders and taxable inhabitants of the school district are authorized to vote a tax, for that purpose, "*on the resident inhabitants of such district*;" and to choose three trustees, who are required "to make a rate-bill or tax-list which shall raise the sum voted on all the taxable inhabitants of said district, agreeably to the levy on which the town-tax was levied the preceding year, and annex to said tax-list, or \*rate-bill, a warrant" to the collector of the district to collect the tax accordingly.

In this case, the amount of the tax was regularly voted by the freeholders and inhabitants of the district; and the trustees made out a warrant to the defendant as collector, with a rate-bill or tax-list annexed, in which the plaintiffs are set down as inhabitants of the said district, (according to the form prescribed in the act,) with a tax of 48 dollars assessed to them.

The case admits that the plaintiffs were not resident in that district, but actually resided in the city of *New-York*.

There is no doubt that, according to the true construction of the common school act, no persons are liable to be taxed for any of the purposes mentioned in the 8th section of that act, except *actual inhabitants of the school district*. The words "*resident inhabitants*," and "*taxable inhabitants*," of the district, are used *synonymously* in that section.

The tax was, therefore, illegally imposed on the plaintiffs, by the trustees of that school district. The only question, of any difficulty, is, whether the collector who executed that warrant can legally claim protection under it. I incline to the opinion that the collector (as well as the trustees) is a trespasser.

The authority of the trustees was *special and limited*; and in assuming a right to tax the plaintiffs, they exceeded the powers vested in them by law. The rule is wisely settled, that in such cases the subordinate officer is bound to see that he acts within the scope of the legal powers of those who command him.

(a) 1 *R. S.* 473.

Experience has shown that the safety of private rights will not admit of a relaxation of this rule; and the uniform current of *English* authorities has supported it with jealous caution. The principle is sometimes harsh in its application; but in order to be efficacious and certain, it is necessary that it should be uniform. Lawless power is never so dangerous as when exerted by public officers, according to the forms of law. The remedy for such abuses ought to be direct and ample. It is, therefore, insufficient to allow an action against the trustees only; they may be insolvent, or beyond the reach of process, while the officer who is the immediate trespasser, is fully able to respond.

The case of *Henderson, &c. v. Brown*, (1 *Caines*, 91.) is clearly distinguishable from the present case. That was an action of trespass against a collector for levying a distress for a tax on the theatre in *New-York*; which had been assessed as a *dwelling-house*, \*when it ought to have been assessed as *land with the theatre upon it*. There was no *want of jurisdiction*, nor *excess of jurisdiction*, in that case. It was an *erroneous*, and not a *void* assessment; and, therefore, the collector was justified.

In the case of the *Marshalsea*, (10 *Co. Rep.* 76.) Sir *Edward Coke*, in exemplifying the distinction, in this respect, between a proceeding *coram non judice*, and a proceeding *inverso ordine*, or *erroneous*, says, "If the Court of Common Pleas, in a plea of debt, doth award a *capias* against a duke, earl, &c., which, by the law, doth not lie against them, and the same appeareth in the writ itself, yet if the sheriff arrest them by force of the *capias*, although that the writ be against law, notwithstanding, inasmuch as the Court hath jurisdiction of the cause, the sheriff is excused." In that case, a *capias* was an *irregular* process. The proceeding should have been by *summons* and *distringas*; yet, as the Court had jurisdiction, in actions of debt, against peers of the realm, the sheriff was justified under the *capias*, although peers were not amenable in that mode.

In this case, the property of the plaintiffs was not taxable in any degree, nor under any modification. The power of assessing the tax is expressly limited to the property of "*resident inhabitants of the school district*;" and it is admitted that the plaintiffs are not persons of that description. The cases of *Harrison v. Bulcock, &c.* (1 *H. Black.* 68.) and *Mayor v. Knowles*, (4 *Taunt.* 634.) are analogous. We are, accordingly, of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

NEW-YORK,  
Oct. 1816.

SUIDAM AND  
WYCKOFF  
V.  
KEYS

[ \* 447 ]

NEW-YORK,  
Oct. 1816.

JAMES JACKSON *against* STONE.

JACKSON  
v.  
STONE.

THIS was an action of trespass, for *mesne profits*, which was tried before Mr. Justice Platt, at the *Greene* circuit, in *September*, 1815.

Where, during the pendency of an action of ejectment, the defendant gives up the possession to a third person, and afterwards the plaintiff recovers judgment, such third person is liable for the *mesne profits*; the recovery in ejectment is conclusive evidence against him, and he cannot set up a title in himself as a bar. (a)

[ \* 448 ]

The plaintiff, in this suit, commenced two actions of ejectment, in 1810, on the demise of *Joseph Atwood*, against *Samuel \* Baldwin* and *Benjamin Baldwin*, for lands in *Windham*, in the county of *Greene*, in which judgments were recovered, in *October* term, 1813, whereon writs of possession were issued, which were executed in *December* following. Previously, however, to these judgments being obtained, the defendant had purchased from one *Scott* about 20 acres of the premises, for which he had received a deed in fee, with warranty, and called upon the *Baldwins* to deliver to him the possession of the land contained in his deed, which they agreed to do, on his allowing them the appraised value of their improvements; they were appraised, the defendant not being present, at 140 dollars, and the *Baldwins* abandoned the possession of about 20 acres to him, and remained in possession of the residue until they were turned out by the writs of possession before mentioned. The defendant, on this trial, showed a perfect title to the premises which he claimed.

A verdict was found for the plaintiff, subject to the opinion of the Court on a case to be made, which was now submitted to the Court without argument.

*Per Curiam.* The defendant, as respects the title to the premises, stands in the same situation as the *Baldwins*, from whom he took the possession of the parcel of land, for which the action of ejectment was brought. The defendant in an action of ejectment cannot, by giving up the possession to a third person, after the commencement of the suit, defeat the effect of the recovery. It is perfectly well settled that a recovery in ejectment, as far as respects the right to *mesne profits*, is conclusive of the title, as to the land possessed by the defendant when the action was brought, into whose hands soever it may subsequently pass, by transmutation of the possession from the defendant in ejectment.

The plaintiff must have judgment.

(a) *Jackson v. Hills*, 8 Cow. Rep. 290. *Jackson v. Combs*, 7 *Ibid.* 36. *Morgan v. Varick*, 8 *Wendell's Rep.* 587. *Graves v. Joice*, 5 Cow. Rep. 261. 264. note a. 2 *Johns. Rep.* 369. 11 *Id.* 406.



\*ALDER *against* GRINER.NEW-YORK.  
Oct. 1816.ALDER  
v.  
GRINER.

THIS was an action of covenant which was tried at the *New-York* sittings, in *April*, 1816, before his honor the chief justice.

The declaration set forth articles of agreement, made the 30th of *April*, 1810, between the plaintiff and defendant, by which the latter agreed to work for the plaintiff as a glass-man; and the breach was, that the defendant would not work for the plaintiff, according to the articles of agreement. A *venue* was laid in the margin of the declaration, to wit, "city and county of *New-York*;" but there was no *venue* stated in the body of it. At the trial, the plaintiff gave in evidence the articles of agreement upon which the action was founded, bearing date the 30th of *April*, 1810, and which concluded thus: "Done in *Boston*, in the day and year above mentioned." The counsel for the defendant then moved for a nonsuit, on the ground of a variance between the instrument declared upon and that given in evidence; as the one must be intended to have been executed in the city and county of *New-York*, and the latter appeared, on the face of it, to have been executed in *Boston*. The cause, however, was permitted to go to the jury, who found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

C. M. Lee, for the defendant, contended, that no *venue* being stated in the body of the declaration, the *place* of the contract must be referred to that given in the margin,† which is *New-York*; and no contract, under this declaration, can be given in evidence, but one dated in *New-York*.‡ But the instrument offered in evidence, in this case, was dated at *Boston*; there was, therefore, a fatal variance.

T. A. Emmet, contra, insisted, that the averment of the place was not necessary to give jurisdiction, for it could not be traversed. The declaration contains no averment that the contract was made in *New-York*, and its appearing to have been\* made in *Boston* is no variance. Reference is made to the *margin* to help a defect of *venue* in the body of the declaration: such reference is never made to injure the plaintiff.§ The case, then, stands precisely as if no *venue* at all was stated, and this is a defect which can only be taken advantage of on a special demurrer. Had it been averred that *Boston* was in *New-York*, the Court would not have allowed it to be traversed or contradicted. Then why not intend, when nothing is said, that *Boston* is *New-York*?

SPENCER, J., delivered the opinion of the Court. The instrument given in evidence is dated at *Boston*, and there is no *venue* in the body of the declaration; in the margin there are the words "city and county of *New-York*."

Where, in a declaration upon an instrument in writing, no *venue* is stated in the body of the declaration, but only in the margin, and no place is alleged at which the instrument was executed, it is no variance if the instrument produced in evidence bears date at a different place from that in which the *venue* is laid. It seems, that it would have been otherwise, had a place been stated in the body of the declaration.

† 1 Chitty, Pl. 279. 9 Johns. Rep. 81.  
‡ 1 Chitty, Pl. 280. 283. 2 Wills. 399. Cro. Jac. 96. 1 Cowp. 177. 2 Ld. Raym. 1040. 10 Mod. 255.

[ \* 450 ]

§ 3 Term Rep. 387.

NEW-YORK,  
Oct. 1816.

GRIM  
v.  
THE PHOENIX  
INS. CO.

The rule as to *venues* is, that when a transitory matter has occurred abroad, it may, in general, be stated to have occurred in an *English* county, without noticing the place where it really happened; but if the real place abroad be stated, which is necessary when the instrument declared on bears date there, it should be shown under a *scilicet*, that it happened in an *English* county. The reason and effect of this rule is given by Lord Mansfield, in *Fabrigas v. Mostyn*, (*Cowp.* 176.) thus: "If a declaration state a specialty to have been made at *Westminster*, in *Middlesex*, and on producing the deed, it bears date in *Bengal*, the action is gone, because it is such a variance between the deed and the declaration as makes it appear to be a different instrument."

After a trial, a bad *venue*, or the want of one, is cured by the statute of *jeofails*; and the *venue* in the margin will help, but not hurt. (3 *Term Rep.* 387.)

Had the declaration, in this case, stated the deed to have been made at *New-York*, we should, probably, have been bound by authority, whatever may have been our private opinions as to the wisdom of the rule, to set aside the verdict on the ground of variance; but it is not alleged that the deed was executed in *New-York*; the words in the margin are not such a direct averment of the fact as to produce a variance; the place stated in the margin is intended for the *venue*, or place from whence the jury are to come, but not as a matter of local description of the execution of the deed, (11 *East.* 118.)

Motion denied.

[ \* 451 ]

\*GRIM against THE PHOENIX INSURANCE COMPANY.

A vessel was insured, among other risks, against fire; during the voyage, a seaman carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up, and wholly lost; it was held, that the insurers were not liable for the loss.

Insurers are not responsible for the fault, negligence, or misconduct, of the master or mariners, not amounting to *barratry*.

A loss occasioned by the mere negligence or carelessness of the master, or mariners, does not amount to *barratry*, which is an act done with a fraudulent intent, or *ex maleficio*.

cabin, reached to the top which covered the companion. A tier of casks, or hogsheads, of gin, were placed against the companion, and across the deck, from one side to the other. The companion projects above the deck about a foot, and the *binnacle* was placed on the quarter-deck, near the companion-way, the plank of which, toward the binnacle, was about one inch and a half thick, and that of the binnacle, about an inch thick. The main or forward cabin was entirely filled with goods, and there was no access to it, it being separated from the after cabin by a bulk-head, extending across the cabin; and the people descended to the after cabin through a scuttle in the deck. The vessel, while proceeding down the bay, was forced back by a storm as far as *Bombay-Hook Island*, where she came to anchor, in the night of the 16th of *October*. It rained hard during the night, accompanied with thunder and lightning, and the storm continued until the morning of the 17th of *October*, and about 5 o'clock, P. M., the vessel blew up, and every person on board perished, except *William Saxton*, a passenger, who had never been a voyage before. At the trial, he was called as a witness for the defendants, and a verdict was taken for the plaintiff, subject to the opinion of the Court, whether, under the circumstances \*of the loss, as stated by this witness, the plaintiff was entitled to recover. In addition to the facts above mentioned, the witness stated that a candle was kept burning in the binnacle every night, from the time the vessel left *Philadelphia*, until she was lost. In the night of the 16th of *October*, the watch on deck came down into the fore-castle, where the witness was, and told one of the crew, who was to take the next watch, to go on deck and take his watch, and to take care of the candle; that the candle in the binnacle had burnt down so far into the socket of the candlestick, that the socket had become so hot he could not put another candle into it, and had stuck the candle to the side of the binnacle, it blowing so hard that he could not keep it burning on the outside. The seaman went grumbling on deck, and in about 20 minutes afterwards, the mate came to the fore-castle, and cried out to the men to turn out, all hands, for the binnacle was on fire. They all got on deck, and the witness immediately after them; they looked for the draw-bucket, but the deck was so much lumbered that it was one or two minutes before it was found. One of the crew drew a bucket of water, and handed it to the mate, as the witness believed, who was standing nearest the binnacle; and while the mate was in the act of throwing the water, the explosion took place. The witness added, that when he first came on deck, there did not appear to be greater light in the binnacle than what a candle would give; that there was a sail which covered the companion-way, and as the mate pulled away the sail, the witness discovered it to be on fire, and as the mate drew the sail, and threw the water, the witness heard a rumbling noise, and was not sensible of any thing afterwards, until he found himself

NEW-YORK,  
Oct. 1816.

GRIM  
v.  
THE PHOENIX  
INS. Co.

[ \* 452 ]

NEW-YORK,  
Oct. 1816.

GRIM  
v.  
THE PHOENIX  
INS. CO.

climbing up the mast of the vessel, which was sinking in the water. The witness said it was the constant usage to bring powder in vessels employed in this trade, and to store it either in the cabin or hold, as was most convenient.

† *Marsh. on*  
*Ins.* 494. 1  
*Burr.* 341. 4  
*Term Rep.* 206.

[ \* 453 ]  
† *Emerig. tem.*  
1. p. 434.

§ *Pothier*  
*Trait. des Ass.*  
No. 53.

|| 3 *Campbell's*  
*N. P. Rep.* 133.

¶ 1 *Johns. Cas.*  
340.

†† 7 *Johns.*  
*Rep.* 46.

§§ *Knight v.*  
*Cambridge,* 8  
*Mod.* 231. S. C.  
1 *Str.* 581. S. C.  
2 *Ld. Raym.*  
1349. See *Val-*  
*lejo v. Wheel-*  
*er, Cowp.* 153.

§§ *Stamma v.*  
*Brown,* 2 *Str.*  
1173. 1 *Term*  
*Rep.* 259, 330.  
7 *Term Rep.*  
506. 8 *Johns.*  
*Rep.* 272. 11  
*Johns. Rep.* 40.

*Slosson*, for the plaintiff, contended, 1. That the policy, being against fire, covered all accidents by fire, not occasioned by the fraud of the insured, or his agents. *Marshall*† says, there can be no doubt, but that a loss occasioned by fire, which is merely accidental, and not imputable to any fault of the master or mariners, is a loss within the policy. He does not state, whether, by the *English* law, the insurer would be liable, if the \*fire happened by the fault of the master or mariners. *Emerigon*‡ lays down the rule, that the insurers are liable for losses by fire; but he says that at *Marseilles* they are not liable for a loss by fire, occasioned by the fault of the master or mariners, unless they have, at the same time, insured against *barratry*;§ though, in many other places, he admits the rule to be otherwise.

In policies of insurance, expressly against fire alone, the insurers are answerable for all losses by fire, though occasioned by the negligence and fault of servants, or, in other words, for every loss not caused by the fraud of the insured. In losses by fire, it must, in almost every case, be occasioned by carelessness, or inattention, or some fault or neglect of servants; and it is the very object of the contract to guard the insured against the consequences of such negligence and faults of others. In the case of *Boyd v. Dubois*,|| tried before Lord *Ellenborough*, there being no evidence of the cause of the fire, the plaintiff had a verdict.

In *Goix v. Knox*,¶ where the policy was against “all risks,” the Court said they should construe the policy liberally, as applying to all losses, except such as arise from the fraud of the insured. The same rule of construction was adopted in *Radcliff v. The United Ins. Co.*†† True, it is a principle in marine insurance, that it does not extend to the acts or faults of the insured, as bad stowage, and the like, because they are not perils insured against. So, in case of deviation, through fault of the master, that puts an end to the contract. In these and other cases, in which the Court have held that the insurer was not liable, it was because the cause of the loss was not a peril insured against.

2. Fraud or gross negligence, on the part of the master or mariners, is *barratry*. The sticking the candle on the side of the binnacle was an act of wilful and gross negligence. Sailing out of port, without paying the port duties, has been held an act of negligence amounting to *barratry*.‡‡ *Barratry* may consist in acts of omission as well as commission. Neglect of duty, as well as criminal conduct, will amount to *barratry*. It is not requisite that the master, or mariners, should propose any gain to themselves by their neglect or violation of duty. §§

Where a person knows his duty, and neglects it, it is that gross negligence which amounts to fraud; *lata culpa dolo equiparatur*.

\*Then, admitting the negligence to be so gross as to amount to barratry, can the plaintiff recover under a count, alleging the loss to be by fire? A loss by fire is one of the perils included in the policy; and the defendant, to defeat the action, sets up another cause of loss, to wit, barratry, which is, also, one of the perils insured against. In *Heyman v. Parish*,† this very question arose before Lord *Ellenborough*, who held that where the plaintiff declared for a loss by the perils of the sea, and the vessel was proved to have been shipwrecked, the plaintiff might recover, though the loss was occasioned by the wilful misconduct of the captain amounting to barratry: the same principle was laid down by this Court, in *Gardere v. The Columbia Insurance Company*.‡ *Barratry* is no defence to an action for the loss by the perils of the sea, or by fire.

*T. A. Emmet*, and *Hoffman*, contra, contended, that the insurers were not liable for a loss occasioned by the negligence or misconduct of the master or mariners. Even if barratry was not enumerated among the risks, the insurers would not be liable for a loss in such a case. *Marshall* clearly marks the distinction between the law of *England*, and that of other countries. In *France*, and other countries, § *barratry* is a term more comprehensive than in the *English* law. || By the law of *England*, no fault of the master or mariners amounts to barratry, unless it proceed from a fraudulent purpose. ¶ In the case of *Boyd v. Dubois*, the cause of the fire was unknown, and the burden of proving it to have been occasioned by the fault of the master or mariners, rested on the defendant, and no fault being shown, the plaintiff had a verdict. So, in *Carruthurs v. Gray*,†† where the ship and goods were seized by the *Russian* government, the defendant undertook to prove that the seizure was owing to the omission of the captain to mention the goods insured in the manifest of the cargo. In *Cleveland v. The Union Insurance Company*,‡‡ the Supreme Court of *Massachusetts* held that the insurers were not liable for a loss by capture, arising from the negligence of the master in leaving the ship's register and other papers at the *Isle of France*, an intermediate port in the voyage insured. Whatever may be the law of other countries, it is settled in *England*, and here, that *barratry* is an act done with a fraudulent or criminal intent, or *ex maleficio*. §§

In *Dæderer v. Del. Ins. Co.*,||| where negligence seems to be \*suggested as amounting to barratry, the Court merely say, that gross negligence is evidence of fraud. If so, it may be rebutted by other evidence, and must go to a jury, who are to decide whether there was fraud or not. It could not be enough, to entitle the plaintiff to recover, to aver a loss by the negligence of the master or mariners. ¶¶ There must be fraud, or criminality. In *Cook v. Com. Ins. Co.*††† the Court define barratry to be every

NEW-YORK,  
Oct. 1816.

GRIV  
v.  
THE PHOENIX  
INS. CO.  
[ \* 454 ]

† 2 *Campb.*  
*Rep.* 149.

‡ 7 *Johns.*  
*Rep.* 514.

§ *Marshall on*  
*Ins.* 518.  
|| *Marshall*,  
518. *Castrogi*,  
*disc.* 1. n. 77.  
¶ 3 *Cowp.*  
*Rep.* 133.

†† *Ib.* 142

‡‡ *Mass. Rep.*  
308.

§§ *Earl v.*  
*Roucroft*,  
*East*, 136.

|| *Condy's ea.*  
*Marsh.* 554, in  
note.

[ \* 455 ]

¶¶ 1 *Str.* 581.  
8 *Mod.* 231. 8  
*East.* 135. per  
*Ld. Ellenbor-*  
*ough.*

††† 11 *Johns.*  
*Rep.* 40.

NEW-YORK,  
Oct. 1816.

GRIM  
v.  
THE PHOENIX  
Ins. Co.

† 7 Term Rep.  
605.

† 7 Term Rep.  
160.

§ 1 Campb. N.  
P. 434.

species of fraud, concerning either the ship or cargo, committed by the master, in respect to his trust as master, to the injury of the owner. In *Phyn v. The Royal Ex. Ass. Co.*† the distinction is taken between a case of gross ignorance or negligence, and fraud; and the jury having negatived the fraud, the defendants had a verdict. In *Law v. Hollingsworth*,‡ the insurers were held discharged, on the ground that there was no pilot on board, which was a breach of the implied warranty in the policy. So, in *Pipon v. Cope*,§ Lord *Ellenborough* considered the plaintiff as having been guilty of gross negligence, in suffering repeated acts of smuggling, which was the cause of the seizure and loss, and he could not, therefore, recover. This neglect is to be considered as a breach of the implied warranty on the part of the assured, to use reasonable diligence and care in regard to the property insured.

The word *fire*, used in the enumeration of the risks in this policy, is subject to the same rules of interpretation as have been settled in regard to the other perils enumerated; and it is a principle pervading the whole law on this subject, that the insurers are not liable for a loss occasioned by the fault or negligence of the insured, his agents or servants.¶ In policies of insurance against fire only, certain exceptions are stated with great precision; but in policies of marine insurance, no exceptions or circumstances whatever are stated. The analogy, therefore, between the two kinds of insurance, does not hold.

Then, what are the facts in this case? Two acts of negligence are shown, either of which is sufficient to discharge the defendants; first, that of the master, in the bad or improper stowage of the *gunpowder*, in a place so exposed to accident; second, that of the mate, and one of the mariners, in putting the lighted candle against the side of the binnacle. The plaintiff proves a loss by fire; the defendants show negligence and misconduct in the master and mariners. So, in *Boyd v. Dubois*, Lord *Ellenborough* said, that if the defendant could show that the hemp was put on \*board in a state liable to effervesce, and it did effervesce, and generate the fire, that would prove such a negligence of the insured, as would prevent his recovery for the loss.

[ \* 456 ]

*Wells*, in reply, insisted, that the plaintiff, *prima facie*, was entitled to recover, and that the defendants, to discharge themselves from the loss, must show, clearly and satisfactorily, that it had been occasioned by the fault or misconduct of the plaintiff. The cases cited by *Marshall*,¶ to show for what acts of the insured, or his agents, the insurers were not liable, are all cases of *ignorance or mistake*; but the present case is an instance of wilful and palpable carelessness. The analogy between marine insurances, and land insurances, against fire only, is, in this respect, complete. The master and mariners, in relation to the owner of the ship, stand in a similar situation to that of domestic servants in regard to the master of a house. Every event of

¶ *Marsh. on Ins.* 487, 488, 490. *Park on Ins.* 62. 6 Term Rep. 656.

fire must proceed from the act of God, as lightning, or from the carelessness and negligence of those who have charge of the subject. If insurers are not answerable for losses by fire, occasioned by the carelessness of servants, then they are responsible only where it is caused by lightning, or the act of God. But the law has not been laid down to that extent. Fire is a peril insured against, and where it is the proximate cause of loss, it is unnecessary to look for the remote cause. Whenever a fire is caused by the carelessness of servants, master or mariners, the insurer is answerable, whatever may be the degree of that carelessness or neglect. It need not be a wilful act committed. The omission of a direct and positive duty is equivalent. It is enough that the omission of duty be the cause of loss by one of the perils insured against. It can be no defence to say that the negligence was gross, and, therefore, a fraud. Placing the candle against the side of the binnacle, and leaving it in that situation, was equally careless as to have thrown it into the companion-way among the kegs of powder. If it is barratry to set fire to the vessel, it is barratry to omit the means of preventing it, by acts in the power of the party to perform. It is said here was bad or improper stowage; but it was proved to be the common practice, in this trade, to carry powder in that manner. The loss was not occasioned by bad stowage, but the carelessness of the mariners.

It is said, that gross negligence is only evidence of fraud; \*but when the fact of gross negligence is established, the conclusion of law irresistibly follows that it is fraud. The plaintiff must aver fraud, not negligence, and when gross negligence is shown, the fraud is established.

NEW-YORK,  
Oct. 1816.

GRIM  
v.  
THE PHOENIX  
INS. CO.

[ \* 457 ]

THOMPSON, Ch. J., delivered the opinion of the Court. The loss in this case is alleged to have been by fire. The policy contains the usual clause, specifying the perils insured against. The facts in this case briefly are, that, the vessel being partly laden with powder, a candle was carelessly put up by the binnacle, which took fire, and communicated to the powder, and the vessel was blown up, and lost. The question is, whether the underwriters are responsible. On the part of the assured, it is contended, in the first place, that this was a loss by *barratry*; and if not, still, under the general words in the policy, the underwriters are answerable for all losses by fire.

It appears to me impossible to consider the negligence by which the loss was occasioned as amounting to *barratry*. It would be absurd to suppose the powder was set on fire by design, and the vessel blown up intentionally, as it must, most probably, have caused the destruction of the whole crew.

It is well settled, that an act, to be *barratrous*, must be done with a fraudulent intent, or *ex maleficio*. *Barratry* is a fraudulent breach of duty, in respect to the owners. This is the established doctrine, both in the *English Courts*, and in our own.

NEW-YORK,  
Oct. 1916.

GRIM  
v.  
THE PHENIX  
INS.

(8 *East's Rep.* 138. 2 *Caines's Rep.* 71.) We look in vain for any one fact in the case, indicating a fraudulent intention. It is, therefore, a loss occasioned by pure negligence.

The next inquiry is, whether such a loss comes within the policy: I think it does not. No adjudged case is to be found directly in point; and all that is to be collected from the elementary writers upon the question, is rather matter of inference. It is laid down by *Marshall*, (*Marsh. on Ins.* 421.) that a loss occasioned by fire, which is *merely accidental*, and not imputable to any fault of the master or mariners, is a loss within the policy. This is the rule in *England*. The inference necessarily to be drawn from it is, that when the fire is occasioned by the fault of the master or mariners, a loss, occasioned thereby, is not to be borne by the underwriters. In *France*, the underwriter is not held answerable in such case, unless, by the policy, he is liable for barratry. But in *France*, barratry comprehends \*every fault, either of the master or mariners, by which a loss is occasioned, whether arising from fraud, negligence, unskilfulness, or mere imprudence. (*Marsh.* 445.) In *England*, if the loss could be attributed to barratrous misconduct, the underwriter would be held liable. It has always been matter of surprise, that underwriters should insure the good conduct, in any case, of the master and crew, with the appointment of whom they have no concern; (1 *Term Rep.* 330. 8 *Johns. Rep.* 227.) and they would not be responsible for their conduct were it not for their express stipulation. The master and mariners are not the agents or servants of the underwriters, so as to warrant the application of the general rules of law in such cases. The liability of the underwriter, for their conduct, depends upon the stipulation in the policy, which embraces only the case of barratry. If, by the general rules of law, underwriters are responsible for the mere carelessness and negligence of the master and mariners, it would seem to follow, as a necessary part of the same rule, that they would be liable for their fraudulent misconduct; and, of course, it was entirely unnecessary to insert in the policy any express engagement to become answerable for losses by barratry. The very circumstance of assuming the risk of barratrous conduct, affords a strong presumption that the underwriters are responsible only for such misconduct as amounts to barratry.

Underwriters have no concern with the competency or skilfulness of the master or crew. These are matters which concern the owners; and any deficiency, in this respect, renders the vessel unseaworthy. If a master, from ignorance or unskilfulness, or from any motive not fraudulent, should depart from the proper course of the voyage, and a loss happen thereby, the underwriter would not be liable, by reason of the deviation. (*Marsh.* 446.) There are many cases of injury and losse arising from the fault and negligence of the master and mari-



ners, where the remedy is against the master or owners, as by bad stowage, wet, and many others. (*Marsh.* 156.)

Although the insurance is against loss by fire generally, yet this must be understood as relating to fire occasioned by some means or act for which the underwriters are responsible. The same rule must be applied to this risk as to the other enumerated risks in the policy. In the case of *Vos & Graves v. The United Insurance Company*, (2 *Johns. Cas.* 180.) the insurance was \*against capture; and, although the vessel was captured, still the underwriters were held not to be responsible, because the capture was occasioned by the misconduct of the master, in sailing towards, with an intention to enter, a blockaded port. *Kent*, justice, in his opinion, says, such an attempt takes away from the assured his right to recover; for he never can be allowed to indemnify himself upon an innocent party, from the consequences of his own want of skill, or from his negligence or folly. The act of the master must be referred to his principal, who appoints him; and, whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it. That the risk of fault in the master (barratry excepted) is not a risk enumerated in the policy; and it would be very unreasonable, that the insurer should be holden, beyond his *express* undertaking, for the fault or folly of the master, whom the insured selects and controls. So, in the case of *Cleveland v. The Union Insurance Company*, (8 *Mass. Rep.* 308.) in the Supreme Court of *Massachusetts*, the loss was by capture, occasioned by the negligence of the master, in leaving the ship's register in the *Ile of France*, and the underwriters were held not to be answerable. *Sedgwick*, justice, said it could not be pretended, that this neglect was a risk expressly insured against, or any risk assumed by the underwriter; and he goes on to show that the remedy must be against the owner; that he is responsible for all losses arising from the negligence, ignorance, or wilful misconduct of the master, that do not amount to barratry. He says, expressly, that the underwriters are not answerable for a loss resulting from the gross negligence or ignorance of the master. The observations made in these cases apply, with great force, to the one now before us, and go to establish the principle, that underwriters are not responsible for any fault, negligence, or misconduct of the master, or mariners, which does not amount to barratry; and that their liability, even for barratry, arises from its being an express stipulation in the policy. *Park*,† (24.) after enumerating the perils designated in the policy, observes that, although the words are so general, there is a great difference between damage sustained by goods, from injuries on board a ship, and that which occurs from external accident; that the insurer is liable for the latter, but, with respect to the former, as they are \*neglects attributable to the master, the ship, and not the insurer, ought to be answerable.

NEW-YORK,  
Oct. 1816.

GRIM  
V.  
THE PHENIX  
INS. CO.

\* 459 ]

† 6th ed. p. 30.

[ \* 460 ]

NEW-YORK,  
Oct. 1816.

BRONSON  
v.  
MANN.

There are many losses, occasioned by some of the perils enumerated in the policy, which may happen under circumstances that would not make the underwriters chargeable. These general terms are used, in reference to the established rules of law; and it is with an eye to those rules, that they must be expounded. Insurance against fire is not the exclusive object of a marine policy. It is enumerated among the perils, in reference to the settled principles of marine law; and we must look to that law, to ascertain the excepted cases. None of the observations here made are intended to apply to land insurances against fire. There the sole object is indemnity against loss by fire; and the general and settled rules of law, applicable to this subject, must be resorted to in construing such policies.

Upon the whole, therefore, the result of my opinion is, that this cannot be considered a loss by barratry, but by the carelessness and negligence of the crew, for which the underwriters are not responsible; and this is the opinion of the Court. The defendants are, accordingly, entitled to judgment.

Judgment for the defendants.

### BRONSON *against* MANN.

In the case of an encroachment on the highway, (2 N. R. L. 277.) where the encroachment is not denied, all the commissioners must confer in regard to making an order to remove it,

[\*461] and the majority may act; but when the encroachment is denied, and the fact is to be inquired into by a jury, one of the commissioners alone may act, and may make complaint to a justice of the peace; or, at least, the want of a joint consultation will not vitiate an inquest subsequently found.

The certificate of a jury, finding an encroachment, is conclusive evidence of that fact, in an action brought to recover the penalty for not removing the encroachment.

In a judgment in a justice's Court for the plaintiff, for costs, the costs for subpoenas, issued on behalf of the defendant, cannot be included. (b)

IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action in the Court below, against the plaintiff in error, to recover the penalty for encroaching on the highway, under the 21st section of the Act for regulating highways. (2 N. R. L. 277, 278.) (a) On the trial, it appeared that the highway in question had been duly laid out and recorded; that two of the commissioners of highways of the town of *Onondaga* had notified the defendant that his fences encroached on the highway, and requested him to remove them; \*and that, the defendant denying the encroachment, one of the commissioners, on behalf of the board, applied to a justice of the peace, for a precept to summon a jury to inquire of the encroachment. Notice thereof was given to the defendant below, and he attended the inquest, and assisted in the examination and survey, and set up stakes to designate the road. The jury summoned for that purpose found the encroachment, and certified it by special metes and bounds, according to the statute; but the defendant did not remove his fences within sixty days, as required by the act. The defendant objected to the recovery, on the ground that it did not appear that all three of

(a) 1 R. S. 522.

(b) Vide *Supra*, p. 350, note (b.)

the commissioners attended and consulted together, in regard to the encroachment ; but the justice overruled the objection. The defendant then offered to prove, that, in fact, there was no encroachment ; which evidence the justice refused to hear, and gave judgment for the plaintiff below. In the amount of costs, for which judgment was given, the justice included 12 cents for two subpoenas, issued on behalf of the defendant below.

NEW-YORK,  
Oct. 1816.

ANNIN  
v.  
CHASE.

*Per Curiam.* Where the encroachment is not denied, and the commissioners, under the 21st section of the act, make an order to remove it, the just construction of the statute requires that all should confer, and then a majority may act ; but where, as in this case, the encroachment is denied, and the fact is to be inquired of by a jury, the commissioners act in the character of informers merely ; and the law requires no order, nor any act of the commissioners, after the finding and certificate of the jury. The omission, for sixty days after the inquest, to remove the encroachment, constituted the offence. The mere complaint to the justice was not such an act as required the united deliberation of all the commissioners ; (9 *Johns. Rep.* 360.) at least, the omission to hold a joint consultation, in regard to the complaint, will not vitiate the inquest which establishes the fact of encroachment. The complaint was initiatory.

On the second point, the justice also decided correctly, in excluding the evidence to contradict the inquisition as to the fact of encroachment. The finding of the jury was conclusive, on this trial, as to that fact. The judgment for costs, however, is erroneous ; so that the judgment must be reversed, as to costs, and affirmed, as to the penalty recovered. (a)

Judgment accordingly.

(a) *Van Bokkelen v. Ingersoll*, 5 *Wendell*, 341.

### \*ANNIN against CHASE.

[ \* 462 ]

IN ERROR, on *certiorari* to a justice's Court.

After issue was joined in the Court below, the defendant in error, who was the plaintiff below, applied for an adjournment, which was granted, and a day fixed on by the parties. On the adjourned day, the defendant below applied for a further adjournment, and offered to swear that he had material witnesses absent ; that he had subpoenaed them, and used due diligence, and expected to procure them, &c. But the justice decided, that, as the parties had mutually agreed upon a day for trial, they were now concluded ; and refused, on that ground, to grant a further adjournment. Judgment was given in the Court below for the defendant in error.

Where an adjournment has been granted in a justice's Court, and a day for trial agreed on by the parties, one of them is not thereby concluded, on showing sufficient cause, from asking for a second adjournment. (b)

*Per Curiam.* Injustice has been done. According to the

(b) *Vide Smith v. Fenton*, 2 *Cow. Rep.* 425

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MILLS.

cases of *Easton v. Coe*, (2 Johns. Rep. 383.) and *Powers v. Lockwood*, (9 Johns. Rep. 133.) the justice should not have refused a second adjournment, on the ground assumed by him, no question being made as to security.

Judgment reversed.

### THE UNION COTTON MANUFACTORY *against* LOBDELL and another.

A count in debt, on simple contract, may be joined in the same declaration with a count in debt on a judgment, although the pleas are different.

Causes of action, which admit of the same plea, and of the same judgment, may be joined in the same declaration.

[ \* 463 ]

THIS was an action of debt. The declaration contained several counts: 1. On a judgment recovered in this Court by the plaintiffs against the defendants; and, 2. Counts for goods sold, money lent and advanced to, and money paid, laid out, and expended for, the defendants, and money had and received. To this declaration there was a general demurrer, and joinder in demurrer.

\* *Cady*, in support of the demurrer. He cited 1 *Chitty*, Pl. 197.

*Henry*, contra. He cited *Gilb. Hist. C. P.* 6, 7. 1 *Chitty*, Pl. 197.

*Per Curiam*. The rule is *invariable*, that causes of action, which admit of the *same plea* and the *same judgment*, may be joined; but the converse of this proposition is not invariably true. Debt on specialty, or debt on judgment, may be joined with debt on simple contract, although they require different pleas. (1 *Chit. Plead.* 197. 2 *Saund.* 117. note 2.)

Judgment for the plaintiffs.

### JACKSON, *ex dem.* WHITLOCKE, *against* MILLS.

Where *A.* was interested to the amount of 100 dollars, in a judgment recovered by *B.* against *C.*, and an execution was afterwards issued, at the

suit of *D.*, against *C.*, on a junior judgment, under which execution *A.* purchased the land, as the trustee of *B.*, and took a deed from the sheriff, and immediately conveyed the land to *B.*, by whom the consideration was advanced; and then an execution was issued upon the elder judgment for the amount for which *A.* was interested therein, and levied upon the same premises, which were sold, and conveyed by the sheriff to *A.*, it was held, that *A.*, having executed the trust, by conveying the land to *B.*, when purchased by him at the first sale, was not thereby estopped from subsequently acquiring a title to the same premises, and might recover them, in an action of ejectment, against a person holding under *B.*, and that, although *B.* forbade the second sale, the conveyance under it was not inoperative; at least, that it could not be inquired into in a collateral action, and could only be determined on a direct application to this Court, or to a Court of equity.

Where a person takes a deed for land in his own name, but the consideration is advanced by another, a trust results in favor of that other person, which may be proved by *parol*. (a)

(a) *Jackson v. Hoffman*, 9 Cow. Rep. 271.; and see *Jackson v. Moore*, 6 Cowen, 706. *Botsford v. Barry*, 2 Johns. Ch. Rep. 409.

*Richard Osborne*, who was the original owner of the premises. The execution was tested the 13th *October*, 1816, and the sheriff was thereby directed to collect 140 dollars. The judgment upon which it was issued was docketed on the 3d *August*, 1807, and was for the sum of 680 dollars debt, and 13 dollars and 56 cents costs; and the deed from *Reuben Swift*, sheriff of the county of *Columbia*, of the premises in question, to the lessor of the plaintiff, bore date the 15th *February*, 1814. On the bond upon which this judgment was entered, the following endorsement was made at the time of the execution of it, to wit, "one hundred \*dollars of the within bond to be for the benefit of *Thomas Whitlocke*," the lessor of the plaintiff, to collect which sum, with the interest, the above-mentioned execution was issued. Prior, however, to the sale upon that execution, an execution had been issued against the same *Richard Osborne*, on a judgment in favor of some person whose name was not stated in the case, but which was docketed subsequently to the other judgment, under which the premises were conveyed by *John King*, then sheriff of *Columbia*, by deed, bearing date before the deed from *Swift*, the lessor of the plaintiff, who, at the same time, conveyed the premises to *Harder*, under whom the defendant holds. The property, as was proved by *Bingham*, the deputy sheriff who made the sale, was bid off by the lessor, at the request of *Harder*, and for his benefit; and was sold subject to *Harder's* judgment, of which due notice was given by *Harder* and *Whitlocke*, and the consideration money was paid by *Harder*. At the sale under the first-mentioned execution, *Harder* exhibited the deed to himself, and forbade the sale.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on the above facts, and the cause was submitted to the Court without argument.

*SPENCER, J.*, delivered the opinion of the Court. The case of *Jackson v. Steenbergh* (1 *Johns. Cas.* 153.) shows that the parol evidence, given by *Bingham*, was admissible; and it was proved that *Whitlocke* was the mere trustee of *Harder*, in taking the sheriff's deed, under the sale on the junior judgment; and the deed from *Whitlocke* to *Harder* was the mere execution of his trust. *Harder* only was beneficially intrusted in that purchase, as it was made for him, and he paid the consideration money. *Whitlocke* never had any interest under that deed, and, therefore, his execution of the trust could not operate as an estoppel to any title he might thereafter acquire, in his own right, to the same lands. Independently of the parol evidence, that the first purchaser was subject to the prior *lien*, the law would produce that result. *Whitlocke*, then, acquired, by his purchase under the senior judgment, a title paramount to that of *Harder's* under the junior judgment, unless *Harder's* forbidding the sale will render the sale, and deed under it, inoperative. It may be well questioned whether he could forbid the sale, rightfully, as

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MILLS.

[ \* 464 ]

NEW-YORK,  
Oct. 1816.

FOSTER  
v.  
GARNSEY.

[ \* 465 ]

*Whitlocke* was interested in it to the amount of 1000 dollars. Be \*that as it may, a sale actually took place, and the title passed to *Whitlocke* under it; and it is too late to question the sale, at all events, in this collateral way.

The only mode in which that question could arise, would have been on a direct application to this Court, or a Court of equity, to set aside the deed. The deed being warranted by the judgment and execution, we cannot now entertain the question, how far the sheriff erred in selling, although forbidden by the nominal plaintiff in the execution. The legal title is in the lessor of the plaintiff.

Judgment for the plaintiff.

---

FOSTER and another *against* GARNSEY, Gent., one of the Attorneys, &c.

The privilege of counsellors and attorneys being taken away, (except during the actual sitting of the Court,) by statute, (1 N. R. L. 416, sess. 36. c. 90. s. 12.) so that they may be arrested and held to bail, like other persons; they stand on the same ground, also, in respect to costs, and if sued by bill, during term, and less than 50 dollars is recovered, they are not liable for costs.

THE defendant, who is an attorney of this Court, was sued by a bill in *assumpsit*, and gave a *cognovit actionem* in the cause, for 35 dollars and 83 cents, beside costs. The plaintiff entered up judgment for the amount of damages confessed, and for the costs, taxed by the recorder of *Albany*, as in this Court, to 39 dollars and 42 cents.

*De Witt*, for the defendant, now moved that the judgment, so far as respects the costs, should be amended, and that the execution, as regarded costs, should be set aside.

*Per Curiam.* In *Snell v. Brooks*, and in *Baird v. Vanderlyn*, which came before the Court at the last term, the question arose how far, and in what cases, attorneys were liable for costs, when parties in a suit. Many of the cases heretofore decided on that question, are inapplicable, as the law now stands. Attorneys, like other persons, are liable to be arrested on *mesne* process, (except during the actual sitting of the Court,) and held to common or special bail. (1 N. R. L. 418.) (a) Their privilege, therefore, is substantially taken away; and being put on the same footing with other persons, as to arrests, they ought to \*stand on the same ground in regard to costs. It ought not to be left to the option of a plaintiff, to make an attorney pay the costs of this Court, by electing to sue him, by bill, in term time. Whether, therefore, attorneys are sued by bill or writ, they must be placed in the same situation as other persons, as to the payment of costs.

[ \* 466 ]

Motion granted.

(a) 2 R. S. 290.

SMITH *against* SHARP.

THE COURT, in this case, said, that where the *venue* in a cause is changed, it is not necessary to serve the defendant with a copy of a new declaration, but it is sufficient to serve him with a certified copy of the rule for changing the *venue*; and he is bound to plead, as if the *venue* had been changed. The plaintiff, however, ought to alter the declaration on file, so as to make it conformable to the rule; and we will order this to be done, at any time, so as to make the pleadings on file regular. The defendant may proceed, on his part, in the same manner precisely as if the alteration had been made; and he cannot avail himself of the want of the alteration as an excuse, or ground of irregularity.

(a) Vide *Keep v. Tyler*, 4 Cow. Rep. 541. *Thomas v. Douglass*, 2 Johns. Cas. 226

NEW-YORK,  
Oct. 1816.

HASSENFRATS  
v.

KELLY.

Where the *venue* in a cause is changed, it is not necessary to serve the defendant with a new declaration, but only with a copy of the rule for changing the *venue*; and the declaration on file may be altered, at any time, so as to conform to the rule. (a)

HASSENFRATS, *qui tam*, &c., *against* KELLY.

THIS was an action of debt, on the 8th section of the statute, to prevent and punish champerty and maintenance, brought \*against the defendant for selling a lot of land, in the town of *Sempronius*, and county of *Cayuga*, which, it was alleged, was, at the time of sale, held adversely to the defendant. The cause was tried before Mr. Justice Yates, at the *Cayuga* circuit.

The premises in question are part of lot No. 19, in *Sempronius*, in the military tract, which was patented to one *Christian Kelly*, a soldier. In April, 1810, the plaintiff entered upon 100 acres, in the north-east corner of the lot, and was possessed thereof until the 14th of April, 1812, when he contracted to sell to *Jacob Brink*, who immediately entered, and has ever since been in actual possession. On the 10th of August, 1812, the defendant, and *Silena*, his wife, by their deed, conveyed the north half of the said lot, No. 19, to *Daniel Hutchinson* and *Charles Stuart*; but the defendant, at the time of executing that deed, had no knowledge of the adverse possession of *Hassenfrats* or *Brink*.

A verdict was found for the plaintiff for the value of the land, subject to the opinion of the Court. The case was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court.

It is admitted, that when the defendant gave the deed, which is the act of *champerty* complained of, he had no knowledge of the adverse possession of *Hassenfrats* or *Brink*. In truth, there-

these facts, afterwards sells and conveys the same, he is not liable to the penalty for selling a pretended title

A person who sells and conveys land, with

[ \* 467 ]

out the knowledge that there is a subsisting adverse possession, is not liable to the penalty for selling a pretended title under the 8th section of the act, to prevent champerty and maintenance.

(1 N. R. L 173.) (b)

The seller of lands is, however, in the first instance, to be presumed consultant of the situation of it.

Where a person enters upon new lands without claim or color of title, and conveys them, by deed, to a third person, and the lawful owner of the land, not having notice of

(b) 2 R. S. 691.†

† *Lane v. Shears*, 1 Wendell's Rep. 423. *Etheridge v. Cromwell*, 8 Id. 629.

NEW-YORK,  
Oct. 1816.

HASSENREATHS  
v.  
KELLY.

fore, the deed was not given for maintenance. Indeed, it does not appear, in point of fact, that the plaintiff, when he entered and took possession of the 100 acres in the north-east corner of the lot, so entered under a claim of *title*; nor does it appear that when he contracted to sell to *Brink*, two years afterwards, that he agreed to sell any other than his possessory right. To produce the consequences of a violation of a penal statute, exposing the party to a forfeiture of the value of the land sold, it ought to appear, expressly, that there was a person in possession at least, claiming to own the land. From the facts in this case, that does not appear. The plaintiff may have been a mere intruder upon the land, without claim or color of title, and his agreement to sell to *Brink* may have been merely for his possession. The Court, therefore, are of opinion, that the defendant has been guilty of no offence within the statute, and, on this ground, we think judgment should be given for the defendant. I am prepared to go further. My opinion would be, that had it appeared that \*the plaintiff sold *Brink* by a warranty deed, yet the defendant would not have been liable to this action, under the circumstances of that case.

[ \* 463 ]

The statute intended to punish persons for selling pretended rights to land, for the purpose of maintenance; and when it is evident that such intention did not exist, there can be no offence. A contrary argument may be derived from the statute, which subjects the taker, or buyer, to the same penalty as the seller, if he knew the sale to have been made against the provisions of the act, indicating, that if the taker, or buyer, did not know it, he should not incur the penalty; and as the statute is silent as to the knowledge or ignorance of the seller, it may be inferred, that the legislature intended to punish him, without regard to that fact, on the ground that he is chargeable with the knowledge of the state and circumstances of his own lands. It would be the legal intendment, undoubtedly, that every man knew the situation of his real property; but if he could show that he did not know it, it would be very unreasonable to subject him to a penalty for an offence perfectly unintentional. The deed, under such circumstances, would be void and inoperative, and there is no good reason why an innocent person, unconscious of offence, should be punished beyond that. In the case of *Partridge v. Strange & Croker*, (1 *Plowd.* 80. 88. 1 *Dyer*, 746.) an exception was taken to the declaration, that there was no averment that the bargain and sale was for maintenance, and the Court held it to be a good exception, and that the plaintiff had not shown the case to be within the danger of the statute, saying, that was the point of the statute. If it was necessary to make that averment, it was necessary to show a state of facts proving it to be true; and where it clearly appears, that the bargain and sale was not for maintenance, the spirit and intention of the statute are not infringed. This was clearly the inclination of the late chief justice's opinion in *Jackson v. Demont*, 384



(9 *Johns.* 59.) though this precise point was not then before the Court. NEW-YORK,  
Oct. 1816.

In the case of *Jackson v. Selleck*, (8 *Johns.* 262.) the question was, whether a *feme covert*, being the owner of wild and uncultivated land, was to be considered as in fact possessed, so as, on her death, to give to her husband a *tenancy by the curtesy*, without an actual entry, or *pedis possessio*; and it was held that she was. The late chief justice, delivering the unanimous opinion of the Court, said, "We must take the rule with such a construction as \*the peculiar state of new lands in this country requires; and this may be done without any departure from the spirit and substance of the *English law*." If we should hold that the plaintiff was entitled to recover in the present case, it would be impossible for any man, owning lands in the unsettled part of our country, to convey them with safety; for, peradventure, some man may have intruded upon them, who would have the hardihood to give a warranty deed. If, then, it should be questionable, under the *English* adjudications, whether the defendant had not been guilty of *champerty*, in deciding this question here, we must regard the very different state of our country; and noticing that it seems to me impossible to maintain the proposition that a person shall be punished, as for a crime, when not only no crime was intended, but the supposed delinquent had every reason to believe, from the state of the property, that he might lawfully sell it.

GREEN  
v.  
ANGEL.

[ \* 469 ]

Judgment for the defendant.

### GREEN against ANGEL.

IN ERROR, on *certiorari* to a justice's Court.

In the course of the trial in the Court below, while the defendant in error, who was also defendant in the Court below, was proceeding with his testimony to substantiate his plea of set-off, the justice decided, that, in order to sustain his plea, it was necessary for him to show a judgment and execution before another justice. The defendant then requested a delay in the trial, until he could go 12 miles to procure the evidence required. To this the plaintiff objected, but the justice said that he would keep the Court open, and allow the defendant 20 hours to go and obtain the testimony. At the time appointed for resuming the trial, the plaintiff did not appear, but the justice proceeded *ex parte*, and heard the defendant's proof of set-off, and rendered judgment, for a balance, in favor of the defendant.

*Per Curiam.* The judgment must be reversed, on two grounds. 1. It was an abuse of discretion in the justice to allow

Where a justice, in a cause before him, suspended the trial, after it had been commenced, for 20 hours, in order to allow one of the parties to produce further proof, it was held an abuse of discretion, and a sufficient ground for reversing the judgment.

Where the trial of a cause before a justice has, after being commenced, been suspended for a time, and, when resumed, the plaintiff does

not appear, it is a discontinuance, and the justice cannot proceed with the trial. (a)

(a) But see 15 *Johns. Rep.* 496, 504. *People v. Whaley*, 6 *Coven*, 661.

NEW-YORK,  
Oct. 1816.

JOHNSON  
v.  
HAIGHT.

such an \*unreasonable time for the defendant to go abroad for evidence during the trial. 2. The non-appearance of the plaintiff, when the trial was resumed, was a discontinuance of the suit, and the justice had no right to proceed any further.

Judgment reversed.

### JOHNSON against HAIGHT and MATHEWS.

The contents of a notice to the endorser of a promissory note, of a demand upon, and a refusal by, the maker, may be proved by parol, or by producing a copy made by the witness at the time of making the original; and it is not necessary that notice to produce the original should have been given.

Payment of a note must be demanded of the maker, in order to charge the endorser, upon the third day of grace, or, if the third day falls upon a Sunday, then upon the second day of grace. (a)

THIS was an action of *assumpsit*, against the defendants, as endorsers of a promissory note. The cause was tried before Mr. Justice Yates, at the Seneca circuit, in June, 1816.

The note in question was executed by William Low, dated the 26th of May, 1815, and payable to the defendants, six months after date, for 427 dollars and 19 cents. The plaintiff proved a demand made at the house of the maker of the note, upon his agent, (the maker being absent,) on the 30th of November, next after the date of the note, and his refusal to pay. The same witness, who proved the demand and refusal, also proved that he sent a notice thereof to the defendants by the next mail, after the demand was made, and produced, and offered to read, in evidence, a copy of the notice which was made at the time of making the original. The defendant's counsel objected to reading the copy, unless notice had been given to produce the original, but the objection was overruled by the judge, and the copy permitted to be read. The plaintiff having rested his cause, the counsel for the defendants then moved for a nonsuit, on the ground that the demand upon the maker of the note ought to have been made on the 29th day of November, next after the date of it; but the judge overruled the objection, and the jury, by his direction, found a verdict for the plaintiff.

The case was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court.

[ \* 471 ] The first point made by the defendants cannot be maintained; \*it has been decided in this Court that a notice to produce a paper might be proved by *parol*. (3 Caines, 174. Turner v. Wilson.) It was held, in Peyton v. Hallet, (1 Caines, 364.) that an abandonment in writing might be proved by *parol*. Another ground, equally decisive, is, that the copy of a notice retained by a witness is to be regarded as a duplicate original, and such duplicate is good evidence, without notice to produce the other. (Philips on Evidence, 342.)

On the second point, the defendants are entitled to judgment. The third day of grace fell on the 29th day of November, and payment was not demanded of the maker until the 30th. The law is perfectly settled, that a note must be demanded on the

(a) Griffen v. Goff, and the cases cited 12 Johns. Rep. 423.

third day of grace, unless that falls on *Sunday*, and then it must be demanded on the second day of grace. (2 *Caines*, 343. 16 *East*, 250.) Here there is no excuse for delaying the demand on the maker, and there is a palpable want of due diligence, which discharges the endorser.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
TERRY.

Judgment for the defendant.

JACKSON, *ex dem.* MERRIT, against TERRY.

THIS was an action of ejectment, for the recovery of part of lot No. 82, in the town of *Homer*. The cause was tried before Mr. Justice *Spencer*, at the last *Courtlandt* circuit.

At the trial, the plaintiff gave in evidence a deed in fee for the premises in question, from *Archibald Turner* to *James Turner*, for the consideration of four hundred dollars, dated the 24th *Sept.*, 1804, which was duly acknowledged on the same day, and recorded in the proper office, *May* 23d, 1805; also a deed in fee from *James Turner* to the lessor of the plaintiff, dated *April* 9th, 1806, for the consideration of 450 dollars, which was duly acknowledged on the same day, and recorded in the proper office, *May* 28th, 1806.

The defendant gave in evidence a judgment recovered in \*the Court of Common Pleas of the county of *Onondaga*, against *Archibald Turner*, at the suit of one *Hubbard*. The *capias* in that suit was returnable on the 4th *Tuesday* in *May*, 1804; judgment was given on the 4th *Tuesday* of *September* following, for 99 dollars 67 cents, and was docketed on the 10th of *January*, 1805. A *fi. fa.* was issued thereon, returnable in *January*, 1805, under which *Archibald Turner's* right to the lot No. 82, in *Homer*, was sold to one *Wood*, by the sheriff of *Onondaga*, who executed a deed to *Wood*, dated the 10th of *April*, 1805, for the consideration of 89 dollars and 90 cents, which was acknowledged and recorded in the proper office, on the 9th of *July*, 1806. The *fi. fa.* before mentioned was filed in the proper office, on the 25th of *Sept.*, 1805, with a special return thereon, that the sheriff had sold all the right and title which *Archibald Turner* had to fifty acres of No. 82, in *Homer*, (being the same that *Turner* lived on,) *April* the 9th, 1805, to *Wood*, the highest bidder. A witness on the part of the defendant testified, that, shortly after judgment was given in favor of *Hubbard*, against *Archibald Turner*, in *September*, 1804, *Archibald Turner*, in the presence and hearing of *James Turner*, inquired of the witness, if *Hubbard* had obtained a judgment against him, and the witness, in the hearing of *James Turner*, informed him that judgment had been obtained against him, *Archibald Turner*; that, on the same day, *Archibald Turner* executed the deed before

Where land is conveyed between the rendering and docketing a judgment against the vendor, to a purchaser, who has notice of the judgment, with intent to elude the judgment creditor, such conveyance is void, as against the creditor.

A sheriff's deed for lands in the military tract must be

[ \* 472 ] recorded; and if, after land has been sold on execution, and a conveyance made by the sheriff, and, before such conveyance is recorded, the former proprietor conveys it to a bona fide purchaser for a valuable consideration, who has his deed first recorded, such subsequent purchaser will gain a priority. (a)

A special return upon an execution, even if sufficient to pass a title to the land, (which, it seems, it is not,) must, in order to give the purchaser under the execution a priority, be recorded.

(a) Vide *Tuttle v. Jackson*, 6 *Wendell's Rep.* 213. *Jackson v. Post*, 9 *Cow. Rep.* 120. *Jackson v. Town*, 4 *Cow. Rep.* 599. *Jackson v. Myers*, 18 *Johns. Rep.* 425. *Jackson v. Cadwell*, 1 *Cowen* 622.

NEW YORK  
Oct. 1816.

JACKSON  
v.  
TERRY.

mentioned to *James Turner*, to which deed the witness on the trial was a subscribing witness. The witness saw no money paid, nor obligation executed, by the grantee, nor did he hear the parties say any thing respecting payment of the consideration expressed in the deed. *James Turner* was in very poor circumstances, and unable, as the witness stated, to pay 400 dollars, and *Archibald Turner* continued in possession of the premises, after the execution of the conveyance, until 1807, when he went away, and left his family, and his family continued to reside on the land for some time after. *Archibald Turner* was in possession of the land when the lessor of the plaintiff purchased it; but a witness on the part of the plaintiff testified, that he was present in the spring of 1806, when *Archibald Turner* hired the land of the lessor of the plaintiff, for one year, upon shares. There was some very slight evidence, on the part of the plaintiff, to show that a consideration actually passed between *Archibald* and *James Turner*, and the defendant attempted to prove that the \*consideration, on the purchase by the lessor of the plaintiff, was paid to *Archibald Turner*; but a witness on the part of the plaintiff testified, that he was present when the lessor of the plaintiff purchased the land, who gave *James Turner* about 70 dollars in cash, a wagon, harness, and a pair of horses, and notes for the balance, which were made payable to *James Turner*.

[ \* 473 ]

A verdict was taken for the plaintiff, subject to the opinion of the Court on the above case.

*Sabin*, for the plaintiff.

*Cady*, contra.

THOMPSON, Ch. J., delivered the opinion of the Court. From the evidence in this case, it is manifest that, as between *Archibald* and *James Turner*, a gross fraud was intended. The sale was made for the express purpose of avoiding the judgment of *Hubbard* against *Archibald Turner*. But there is no evidence that the lessor of the plaintiff was, in any manner, privy to such fraud. He appears to have been a *bona fide* purchaser from *James Turner*, without any knowledge of the fraud between him and *Archibald*, and, of course, he is not to be prejudiced by it. The right between these parties will, therefore, depend upon the question, whether, under the act for registering deeds and conveyances, relating to the military bounty lands, (1 N. R. L. 209.) (a) a deed from the sheriff, upon a sale under an execution, is necessary to be recorded. The judgment under which the defendant derives his title, was docketed, the sale made, and execution returned, and filed, and a deed given, before the deed from *James Turner* to the lessor of the plaintiff, but the latter deed was first recorded; so that, if the act applies to such sales, the deed to the lessor of the plaintiff has priority. The act declares that all deeds or conveyances, of, or concerning, or

(a) 3 R. S. 187.

whereby any of the said lands may be any way affected, in law or equity, shall be recorded; and that every deed, or conveyance, of such land, shall be adjudged fraudulent and void against any subsequent purchaser, for valuable consideration, unless the same be recorded before the recording of the deed or conveyance under which such subsequent purchaser shall claim.

In the case of *Simonds v. Catlin*, (2 *Caines's Rep.* 61.) it was \*decided by this Court, that the estate of a defendant did not pass at a sheriff's sale without a deed or note in writing, to be signed by the sheriff; and reference is there made to this very statute, and the precise case now before the Court stated, to show the evil that would result from considering the title as passing by the sale without a deed; and it seemed there to be assumed, as the clear construction of the statute, that a sheriff's deed, as well as any other, must be recorded. There is no good reason why it should not be so. The object of the statute was, to enable purchasers to ascertain the validity of the title, and to determine whether they could purchase with safety; and the law refers them to the record for this purpose.

If the sheriff's sale is to defeat the purchaser, he would in vain seek for the evidence of the title. And if it should be admitted, as was urged upon the argument, that the return on the execution might be so special as to supersede the necessity of a deed, it would not dispense with the necessity of having it recorded. This return would then be the evidence of title, and ought to be considered as falling within the reason of the act; it would be an instrument by which the lands would be affected; and all such are to be recorded, or deemed void against subsequent *bona fide* deeds duly recorded. But although, in the case of *Simonds v. Catlin*, it is said, that on a sheriff's sale of land, a deed or note in writing, signed by the sheriff, is necessary to pass the title, a return endorsed on the execution never has, as yet, been considered, by this Court, as sufficient for that purpose. Upon the whole, therefore, we think it will best comport with the reason and policy of the statute, as it certainly does with the letter, to extend it to sheriffs' deeds as well as to others. The deed to the lessor of the plaintiff, having been first recorded, is entitled to priority. Judgment must, accordingly, be entered for the plaintiff.

Judgment for the plaintiff. (a)

(a) Vide *Jackson v. Mather*, 7 *Cow. Rep.* 301.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
TERRY.

[ \* 474 ]

NEW-YORK,  
Oct. 1816.

SHEPARD  
v.  
MERRILL.

In an action of slander, for charging the plaintiff with having stolen the defendant's shingles, a justification, stating that the plaintiff had sold the defendant's shingles without his authority, and afterwards denied that he knew any thing respecting them, without alleging that the plaintiff took them privately or feloniously, does not amount to a charge of larceny, and is bad as a justification; nor can those facts be given in evidence in mitigation of damages.

A notice of special matter, to be given in evidence under the general issue, although not required to be in the strict, technical form of a plea, yet must contain all the facts necessary to be stated in a special plea. (a)

The truth of slanderous words cannot be given in evidence under the general issue, without notice, either as a justification, or in mitigation of damages (b)

Where the record is made up, a general assignment of errors is sufficient. (c)

\*SHEPARD against MERRILL.

IN ERROR, from the Court of Common Pleas of the county of Oneida.

The defendant in error brought an action of slander in the Court below against the plaintiff in error. The declaration contained two counts; in the first, it was alleged, that the defendant had charged the plaintiff with stealing his shingles; and in the second count, that he had said that the plaintiff and one *Tucker* had stolen his shingles. The defendant below pleaded the general issue, and gave notice therewith that he should give in evidence on the trial, that he, the defendant, "on leaving a house in *Whitestown*, demised to the plaintiff and *Joseph Tucker*, left on the premises two thousand shingles, with direction to one *John Mills* to sell the same; that afterwards the plaintiff solely, or with the said *Tucker*, without any authority of the defendant, sold the shingles, and, on the defendant's inquiring for the shingles, denied that he knew any thing about them, or what had become of them, and refused to account therefor; wherefore the defendant, on coming to the knowledge of the said facts, related the same, stating the circumstances, as he was warranted in doing."

The cause was tried at the *March* term, 1816, of the Court below, and, the plaintiff having made out his case, the defendant offered to prove, as a justification under the notice, that the charge of theft was true, and that the plaintiff had, in fact, been guilty of the charges made, which being objected to, the Court overruled the testimony as a justification, on the ground that no notice, to that effect, had been given. The defendant then offered to prove the same fact in mitigation of damages, which the Court also overruled. He then offered to prove the fact contained in the notice annexed to his plea, as an explanation of the charge, but offered no evidence whatever to show that any such explanation was given when the charges were made, which being objected to, the Court overruled the same, and the jury found a verdict for the defendant in error. A bill of exceptions was tendered by the defendant below to the opinion of the Court, which was removed into this Court, by a writ of error.

\*A preliminary objection to hearing the bill of exceptions read, was made by the counsel for the defendant in error, that the assignment of errors was general to the whole record, and not to the bill of exceptions.

THOMPSON, Ch. J. Where the record is made up, we have not required a special assignment of errors to the bill of excep-

(a) It need not be so precise and particular as a special plea. *Chamberlain v. Gorham*, 20 *Johns. Rep.* 746. Vide, also, 8 *Johns. Rep.* 455. 8 *Wendell* 570 6 *Cowen*, 118.

(b) Vide *Van Anken v. Westfall*, 14 *Johns. Rep.* 233.

(c) Vide *Dale v. Roosevelt*, 8 *Cow. Rep.* 333.

tions, but have considered the general assignment of errors as sufficient.

*Talcot*, for the plaintiff in error, contended, that the evidence offered at the trial ought to have been received in justification; that the notice, though not drawn with the technical precision of a special plea, was sufficient for the purpose of apprising the plaintiff of the ground of defence; that, if the facts stated in the notice amounted to felony, or would justify a jury in drawing the inference that it was a felonious taking, it was all that was necessary.† That circumstantial evidence might be given in evidence in mitigation of damages.‡

*Storrs*, contra, insisted, that the notice of justification ought to state a felonious taking, or circumstances amounting to felony; that this notice contained no allegation of a felony, but stated merely a breach of moral obligation, or of an implied contract. Truth cannot be given in evidence, even in mitigation of damages, without notice.§

SPENCER, J., delivered the opinion of the Court. The Court below properly excluded the evidence offered on the trial. Notice, under the statute, must apprise the opposite party of every material fact intended to be given in evidence. The statute (1 N. R. L. 515.) (a) authorizes a defendant to plead the general issue, and to give any special matter in evidence, which, if pleaded, would be a bar to the action, giving notice with the plea, of the matter, or several matters, so intended to be given in evidence.

The true way to test the sufficiency of a notice, is to inquire whether the matters contained in it, if pleaded specially, would be good on general demurrer. Applying that test to this case, the answer is obvious. The declaration alleges that the defendant below charged the plaintiff below with a theft; and the \*notice states that the plaintiff below sold the defendant's shingles, without authority, and that he, afterwards, denied that he knew any thing about the shingles. This, by no means, imputes a larceny, but rather the telling a lie. It is not stated that the shingles were taken privately or feloniously; and if they were not, a subsequent denial of taking them would not make the taking felonious. A notice need not partake of the form and strict technicality of a special plea, but it must contain the substance of a plea; or, otherwise, what was intended for the ease and accommodation of one party would operate most injuriously to the other, by surprising him with facts which he could not expect to meet. The case of *Lawrence v. Knies* (10 Johns. Rep. 142.) contains the principle which I have endeavored to elucidate.

No principle is better established than that the truth of slanderous words cannot be given in evidence under the general issue, either as a defence, or in mitigation of the damages.

NEW-YORK,  
Oct. 1816

SHEPARD  
v.  
MERRILL.

† 1 Johns. Cas.  
279. 8 Johns.  
Rep. 465.

‡ Peak's Ex.  
257. 2 Campb.  
Rep. 251.

§ *Rumyan v.*  
*Nicolls*, 11  
*Johns. Rep.*  
547.

[ \* 477 ]

NEW-YORK,  
Oct. 1816.

MERRITT  
v.  
O'NEIL.

The facts offered to be proved on the trial of this case, under the notice, and in mitigation of damages, were irrelevant, and, therefore, correctly excluded.

Judgment affirmed.

### MERRITT against O'NEIL.

If a person impound beasts, taken damage feasant before the damages have been ascertained by the fence-viewers, he is liable to an action of trespass by the owner.

And it is no defence to such action, that the owner of the beast is himself the pound-master; if the distrainer has actually put them [ \* 478 ] into his custody as pound-master.

Whether it would be a defence if they had not been delivered to the owner, as pound-master? *Quære.*

IN ERROR, from the Court of Common Pleas of the county of Ulster.

The plaintiff in error brought an action of trespass, *de bonis asportatis*, against the defendant in the Court below, for taking and driving away his hog. The cause was tried at the December term, 1815, of the Court below.

On the trial, it appeared that the plaintiff's hog came, on Sunday, into the cornfield of the defendant, and that the defendant drove it into his barn-yard, and kept it there until the next morning, and then drove it to the house of the plaintiff, who was pound-master for the town of Hurley, where both the parties resided, and told him, that he had brought the hog to be impounded for having done damage the day before in his corn, and directed the plaintiff to impound the hog. The plaintiff then turned the hog into his barn-yard, which was used as the public pound for the town of Hurley, and told the defendant that the hog was impounded, and the defendant then went away. The defendant, after the hog had been delivered to the plaintiff, called the fence-viewers to appraise the damage done by the hog, which they appraised, and certified, at four dollars, beside their fees; and the plaintiff, afterwards, as pound-master, advertised and sold the hog for four dollars.

The Court below having expressed their opinion that the plaintiff ought not to recover, he excepted to their opinion, and submitted to a nonsuit. A bill of exceptions was tendered to the judges of the Court below, which was sealed by them, and removed into this Court by writ of error.

*W. Duer*, for the plaintiff in error, contended, that, as the damages had not been assessed before the hog was impounded, the defendant was a trespasser *ab initio*;† and the circumstance of the plaintiff himself being the pound-master, could make no difference. As a public officer, he was bound to keep all cattle, &c., brought to him to be impounded. The pound-master is a mere depository.‡ He is not a ministerial officer, like a sheriff. The person distraining is the active party; the pound-master is merely passive, and is to keep the beast as in the custody of the law.

*C. H. Ruggles*, contra, insisted, that the object of the statute

† 2 N. R. L. 134. (a) 2 Johns. R. p. 191. 10 Johns. Rep. 254. 369.

‡ Cowp. 476.



was to give greater force and effect to the common law remedy of distress, in order to compel the owner of the beast, who is a wrong doer, to make satisfaction to the party injured; but the very purpose of the act would be defeated, if the party distraining was obliged to put the distress or pledge into the hands of the wrong doer himself; the act never could have contemplated such a case. If a *ca. sa.* issue against a sheriff, is he to imprison himself? In *Day v. Brett*,† which is analogous in principle, the Court said, in case of a *ca. sa.* against the sheriff, the coroner was bound to make his own house the prison; it being a *casus omissus* in the statute. So the present must be regarded, also, as a *casus omissus*, and the party distraining is to proceed as at common law, and keep the beast in his own custody.‡

Again; if a distress is taken irregularly, the owner of the beast \*may retake it;§ and if it comes again into his possession, he may keep it; and if it is in the possession of the owner lawfully, he cannot be made a trespasser *ab initio*. If the taking of the beast was void as a distress, the pound-master was not bound to keep and impound it. It is precisely as if the defendant in error had exercised his right of recaption. In the case referred to in *Cowper*, the owner of the beast and pound-keeper were different.

*Per Curiam.* This case comes before the Court on a writ of error to the common pleas of *Ulster* county; and the question arises upon a bill of exceptions taken at the trial. It was an action for trespass, for taking, damage feasant, a hog of the plaintiff, and impounding it, before having the damages ascertained. This has been repeatedly decided by this Court to be irregular and unlawful, and to render the party impounding a trespasser. (2 *Johns. Rep.* 191. 10 *Johns. Rep.* 253.) It has been attempted, however, to take this case out of the principle which governed former decisions, because the plaintiff here is himself the pound-keeper, and the defendant not bound to put the distress into his custody. But, under the facts in this case, the defendant cannot claim any benefit from this distinction, if any exists, because he did put the hog into the pound, notwithstanding the plaintiff was the keeper; and it was received and treated as a beast impounded, and the defendant cannot be permitted to say the plaintiff was not bound to receive the hog, or he to deliver it to him. The Court below, however, decided, that the action could not be maintained, under such circumstances, and nonsuited the plaintiff. In this they erred, and the judgment must be reversed.

NEW-YORK,  
Oct. 1816.

MERRITT  
v.  
O'NEIL.

† 6 *Johns. Rep.*  
22.

‡ 3 *Bl. Com.*  
6, 7. *Co. Litt.*  
47. b.

[ \* 479 ]  
§ *Co. Litt.* 161.

Judgment reversed.

NEW-YORK,  
Oct. 1816.

WHELOCK  
v.  
BRINCKER-  
HOFF.

A parent is bound to provide his infant children with necessaries; and if he neglect to do so, a third person may supply them, and charge the parent with the amount. (a)

But such third person must take notice of what is necessary for the infant, according to his situation in life; and where the infant lives with his parent, and is provided for by him, a person furnishing necessaries cannot charge the parent.

\*VAN VALKINBURGH *against* WATSON and WATSON.

IN ERROR, on *certiorari* to a justice's Court.

The defendants in error brought an action in the Court below against the plaintiff in error, for necessaries furnished by them to his infant son. On the trial, it appeared that the son of the defendant below came to the store of the plaintiff's below, and purchased a coat for himself; but there was no evidence that it was done with his father's consent. The defendant proved that his son lived in his family, and was comfortably and decently clothed, according to his circumstances. A verdict and judgment were given for the plaintiffs in the Court below.

*Per Curiam.* A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with, at his peril. (*Simpson v Robertson*, 1 *Esp. Rep.* 17. *Ford v. Fothergill*, *Id.* 211.) In the case of *Bainbridge v. Pickering*, (2 *Wm. Black. Rep.* 1325.) *Gould, J.*, says with great propriety, "No man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom: all that must be left to the discretion of the father or mother." Where the infant is *sub potestate parentis*, there must be a clear and palpable omission of duty, in that respect, on the part of the parent, in order to authorize any other person to act for, and charge the expense to the parent. In this case there is no ground to charge the father with any neglect of duty, in providing necessaries for his child, and the judgment must be reversed.

Judgment reversed.

(a) Vide *Forsyth v. Ganson*, 5 *Wendell's Rep.* 562. But a husband is not bound to support his wife's children by a former marriage. *Overseers of Minden v. Cox*, 7 *Cowan*, 235.

[ \* 481 ]

\*WHELOCK *against* BRINCKERHOFF.

IN ERROR, on *certiorari* to a justice's Court.

The security required to be given by a non-resident plaintiff, in commencing an action before a justice of the peace, by a warrant, may be a deposit of money with the justice.

The plaintiff in error, who was also plaintiff in the Court below, brought an action of trespass, *de bonis asportatis*, against the defendant, and, being a non-resident, the suit was commenced by warrant, on his depositing five dollars with the justice, as security. Upon the return of the warrant, the defendant inquired of the justice whether the plaintiff had given secu-

And where, in an action of trespass, five dollars were deposited, as security, it was held sufficient.

city, and was informed, generally, that he had, without stating the nature of the security. The cause was then adjourned, and, at a second meeting, the defendant inquired respecting the security, and was then told that five dollars had been deposited for that purpose. This was objected to by the defendant, and the plaintiff refusing to give other security, the justice nonsuited him. The plaintiff, afterwards, offered to give other security, but the justice decided that it was then too late.

NEW-YORK,  
Oct. 1816.

HASTINGS  
v.  
WOOD AND  
CURTIS.

*Per Curiam.* The act (1 N. R. L. 388.) (a) declares, that if a non-resident plaintiff tenders to the justice security for the payment of any sum which may be adjudged against him, he shall be entitled to have a warrant against the defendant. The nature of the security is not designated, and there can be no good reason why the deposit of money should not be deemed competent security; and if so, the sum deposited was sufficient. It was to as great an amount as could be adjudged against the plaintiff; the action being trespass, there could be no set-off, and the costs are limited to five dollars, except under some special circumstances, which we are not to intend existed in this case. The judgment must, therefore, be reversed.

Judgment reversed.

(a) 2 R. S. 223.

**\*HASTINGS against WOOD AND CURTIS.**

[ \*482 ]

IN ERROR, from the Court of Common Pleas of the county of Franklin.

This was an action of trespass on the case, brought by the defendants in error against the plaintiff in error. The declaration contained two counts: 1. A count in trover, for five yoke of oxen and five cows. 2. A special count, which stated that the plaintiffs below were possessed, as of their own property, of one yoke of oxen and one cow, which were feeding on the commons and public highway of the town of *Constable*, and that the defendant took up the said cattle, and impounded them upon his own premises; and, while they were in his possession, insinuated, represented, and affirmed, to one *Danforth*, then an inspector of the customs for the district of *Champlain*, that they were intended to be smuggled, and had been smuggled, into *Canada*; by reason of which false representations, *Danforth* was induced to seize the cattle, as forfeited to the use of the *United States*, and, as inspector of the customs, did seize them, still being in the possession of the defendant, and at his instance; in consequence of which false and malicious representations, they were converted and disposed of to the use of the *United States*.

The cause was tried at the *June* term, 1815, of the Court

In a declaration in trespass on the case, it was alleged that the defendant, by false representations, procured certain cattle belonging to the plaintiff to be seized by a custom-house officer, under pretence that they were about to be smuggled into *Canada*, and then proceeded to state that, in consequence of those representations, the cattle were converted and disposed of to the use of the *United States*, it was held, that after a verdict for the plaintiff, it could not be intended from

this allegation, that the cattle were condemned as forfeited to the *United States*.

NEW-YORK,  
Oct. 1816.

NELSON  
v.  
SWAN.

below. At the trial, the plaintiff having closed his evidence, the defendant moved for a nonsuit; but the Court permitted the cause to go to the jury, who found a verdict for the defendants in error. The counsel for the plaintiff in error excepted to the opinion of the Court, and the bill of exceptions, with the record and pleadings, were removed into this Court, by writ of error.

*Wendell*, for the plaintiff in error.

*Walworth*, contra.

*Per Curiam.* This case comes before the Court on a writ of error, to the common pleas of *Franklin* county. The record is accompanied by a bill of exceptions. But the counsel on the argument abandoned all objections growing out of the bill of exceptions, and relied entirely upon an alleged defect in the second \*count in the declaration. This is a special count, for having fraudulently procured certain cattle belonging to the plaintiff to be seized by a custom-house officer, under a pretence that they were about to be smuggled into *Canada*, contrary to the laws of the *United States*; and alleged that, in consequence of such fraudulent conduct, the said cattle were converted and disposed of to the use of the *United States*. This, as is contended on the part of the defendant, is equivalent to an averment, that the cattle were condemned as forfeited to the *United States*, and, of course, that the plaintiff had no interest or title to them. This allegation will not fairly warrant the construction, that the cattle had been condemned as forfeited, but only that, by the representations of the defendant, they had been seized and taken possession of by an officer of the *United States*, under a pretence of their being forfeited, and by such seizure were converted and disposed of to the use of the *United States*, and the plaintiff thereby deprived of them. We ought not to pretend, after verdict, that there was any proof or suggestion upon the trial of a condemnation. The judgment of the Court below must, accordingly, be affirmed.

Judgment affirmed.

### NELSON against SWAN.

Where there is a demurrer to the whole declaration, and one of the counts is bad, that count cannot be referred to for the purpose of helping out and aiding another count.

The common money counts may be united in one count, in which may also be comprised a count for goods sold in the like general form.

But a count, generally, for certain lands sold and conveyed by the plaintiff to the defendant, without any particular description, is bad, and cannot be joined with the common counts. (c)

THIS was an action of *assumpsit*. The declaration contained two counts: 1. The first count stated, that the plaintiff was possessed of 30 acres of land, in lot No. 139, in the *Oneida* reservation, which was advertised for sale, by virtue of mortgage to the people of the state of *New-York*, and that, in con-

(c) *Potter v Bacon*, 2 *Wendell's Rep.* 583.

sideration that the plaintiff had bargained and sold the same to the defendant, for a certain stipulated sum agreed upon, and that the plaintiff would accept the same, exclusive of 96 dollars, the defendant promised to pay the plaintiff 96 dollars, provided that, at the public sale of the land, it should be bid up only at such a sum that the defendant should find it for his interest to purchase; and the plaintiff avers that, at the sale of the land, it was bid up for such a sum that the defendant found it for his interest to purchase, and receive, the title to the same, and actually did purchase, and receive, the same, by means whereof, &c.

NEW-YORK  
Oct. 1816.

NELSON  
v.  
SWAN.

\*2. The second count stated that the defendant "was indebted to the said plaintiff, in the sum of 200 dollars, current money of the state of *New-York*, for certain lands sold and conveyed by the said plaintiff, to the said defendant, at his special instance and request; also, in the further sum of 200 dollars, of like current money, as well for divers goods, wares, and merchandise, sold and delivered by the said plaintiff to the said defendant, at his like instance and request; also, as well for money paid, laid out, and expended, by the said plaintiff, to and for the use of the said defendant, as money lent and advanced by the said plaintiff to the said defendant, at his like special instance and request; also, as well for work and labor, care and diligence done, performed, and bestowed, by the said plaintiff, in and about the business of the said defendant, at his like special instance and request, as on an account stated between them, in consideration whereof, &c."

[ \* 484 ]

The defendant demurred to the whole declaration, and assigned several causes of demurrer, of which it is only necessary to notice those that apply solely to the second count, the first count being admitted to be bad. These were, 1. That the causes of action stated in that count could not be joined. 2. That a general count, *indebitatus assumpsit*, ought to be confined to a union of the money counts alone. 3. That the stating an indebtedness for "certain lands," and "on an account stated," is too vague and uncertain. 4. That no promise to pay the sum of 200 dollars for the land is any where alleged. The plaintiff joined in demurrer.

*Storrs*, in support of the demurrer. He cited *Bailey & Bogert v. Freeman*, (4 *Johns. Rep.* 280.)

*Talcot*, contra. He cited 1 *Chitty's Pl.* 643. 1 *Saunders' Rep.* 108. 2 *Saund.* 379. 2 *W. Bl.* 410. 2 *Chitty's Pl.* 7 *Yelv.* 175.

THOMPSON, Ch. J., delivered the opinion of the Court. This is a special demurrer to the whole declaration, which contains two counts. It was admitted, on the argument, by the plaintiff's counsel, that the first count could not be supported; but it was contended, that the second was good; and the demurrer

NEW-YORK,  
Oct. 1816.

NELSON  
V.  
SWAN.

[ \* 485 ]

being to the whole declaration, the plaintiff was entitled to judgment. The \*second count is imperfect, unless helped by reference to the first ; and when the demurrer is general, and one count is bad, nothing in that count can be resorted to for the purpose of helping out and aiding another count. We must look at the other count as if the defective one was struck out of the declaration. Independently of this difficulty, however, the second cannot be supported. The special cause of demurrer is, that the count embraces several causes of action, some of which are too generally stated. It has been decided in this Court, in the case of *Bailey & Bogert v. Freeman*, (4 *Johns. Rep.* 283.) that the common money counts may be united in one, in the manner adopted in the declaration before us ; and this is conformable to the established practice in *England*. The decision in this Court went no farther than as to the money counts. But this does not appear to be the limit according to the *English* practice and precedents, nor can there be any good reason urged why it should be. In the case in *Saunders*, (2 *Saund.* 122. n. 2.) to which we refer as sanctioning the practice, the count for goods sold and delivered, is blended with the money counts, under this general form. 'The generality of the statement of the several causes of action in one count would be exceptionable, as tending to a surprise upon the defendant, were it not for the practice of calling on the plaintiff for a bill of particulars, by which the defendant is better apprized of the particular cause of action than he would be by a more special count. But, in this case, the count also embraces a cause of action for land sold and conveyed, generally, without any particular designation or description. This is going farther than is warranted by any precedents that have fallen under my observation, and further than ought to be sanctioned. Land sold and conveyed is a good consideration for a promise ; but, in such case, according to the precedents, the land sold is particularly and specially described in the declaration ; and it is most advisable to adhere to the precedents, and not introduce too great laxity in pleading. The defendant must, accordingly, have judgment upon the demurrer, with leave, however to the plaintiff to amend his declaration.

Judgment accordingly.

**\*WOOD against BULKLEY.**NEW-YORK,  
Oct. 1816.TAYLOR  
v.  
BETSFORD.

THIS was an action of *assumpsit* upon a promissory note, made by the defendant, and payable to the plaintiff. The cause was tried before Mr. Justice Yates, at the *Onondaga* circuit, in 1816.

The declaration contained but one count, which was on a promissory note, drawn by the defendant, "by the name and description of *Christ. Bulkley*." The defendant's counsel objected to the admission of the note, on the ground of a variance between the signature of the note, and the name stated in the declaration; but the judge overruled the objection, and the plaintiff proved that the defendant usually signed his name in the same manner as in the note in question. The defendant's counsel offered to prove a variance between the copy of the declaration served, and the *nisi prius* record, as to the name of the defendant. The judge refused to receive the testimony, and a verdict was found for the amount of the note.

The defendant now moved for a new trial, and the cause was submitted to the Court without argument.

*Per Curiam.* The motion for a new trial must be denied. There was no material variance between the note set out in the declaration, and the one produced in evidence. The signature of the defendant, by the abbreviation of *Christ.* for *Christopher*, was proved to be the usual and ordinary way in which he signed his name. According to the case, there is, in point of fact, no variance between the *nisi prius* record, and the copy of the declaration, as served on the defendant, even if such proof could have been admissible. But this was not matter that could be inquired into upon the trial. The judge at the circuit must be governed by the *nisi prius* record, and any variance, if material, must be made the subject of an application to the Court, and the verdict would, no doubt, be set aside, if the defendant was prejudiced by such variance. But no such variance appears to exist in this case, according to the defendant's own allegation.

A promissory note was alleged, in the declaration, to have been drawn by the defendant, by the name of "*Christopher Bulkley*;" and the note produced in evidence was signed "*Christ. Bulkley*;" it being proved that this was the defendant's usual mode of signing his name, it was held that there was no variance.

A defendant cannot allege at the trial, that there is a variance between the copy of the declaration, as served, and the *nisi prius* record: the judge must be governed by the record alone, and, if there is a material variance, the party must apply to the Court to set aside the verdict (a)

New trial denied.

(a) *Wardell v. Pinney*, 1 *Wendell's Rep.* 217.

**\*TAYLOR against BETSFORD.**

[ \* 487 ]

IN ERROR, on *certiorari* to a justice's Court.

When the jury in the Court below retired to deliberate upon their verdict, the justice, at the request of the jury, went into

before him, unless with the consent of the parties; which consent cannot be inferred from their silence, but must be made to appear affirmatively, otherwise the judgment will be reversed. (a)

A justice cannot deliberate, privately and apart from the parties, with the jury, in a trial

(a) *Bunn v. Croul*, 10 *Johns. Rep.* 239. *Benson v. Clark*, 1 *Cowen*, 258.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
VROOMAN.

the room with them, to answer certain questions proposed to him by the jury, but was not accompanied by the parties, nor had obtained the consent of the plaintiff in error, who, however, knew that the justice was going, and did not object to it. A verdict and judgment was given in the Court below for the defendant in error.

*Per Curiam.* The only error necessary to be noticed in this case is, that the justice went into the room with the jury, at their request, privately and apart from the parties, to answer certain questions proposed to him by the jury. This we have repeatedly held to be erroneous, unless done with the consent of the parties. Whether the information given by the justice were material, or had any influence upon the verdict of the jury, is a matter which we will not inquire into. In the present case, it cannot fairly be inferred that the plaintiff in error gave his consent, unless from the circumstances that he knew that the justice was going in to the jury, and did not object. But this is not enough. The practice is dangerous and improper, and ought to be guarded against; and the consent ought not to be matter of inference, as it may be liable to great abuse: it ought to appear affirmatively that it was done with the consent of parties. If they are present, it may be easily ascertained whether they will give it or not, and then the door will be shut against abuse, by reason of misunderstanding, or wrong conclusions drawn from circumstances; and, upon this ground, the judgment must be reversed.

Judgment reversed.

[ \* 488 ]

\*JACKSON, *ex dem.* SMITH, against VROOMAN.

Where land was conveyed, and the grantee entered into possession, and afterwards proceedings were had in partition, in relation to the same premises to which the grantee was not a party, and the premises were sold by commissioners appointed by the Court, and conveyed by them to the purchaser; it was held, that the first grantee was not precluded, by the proceedings in partition, from controverting the right of the subsequent purchaser, and that, his possession being adverse, the deed from the commissioners was void. (a)

THIS was an action of ejectment brought to recover part of lot No. 196, in *Klock and Nellis's* patent, situate in the town of *Palatine*, in the county of *Montgomery*. The cause was tried before Mr. Justice *Yates*, at the *Montgomery* circuit, in *August*, 1815.

The plaintiff claimed under proceedings and judgment in partition, in the Court of Common Pleas of the county of *Montgomery*, under which the premises in question were sold by commissioners appointed by the order of the Court, who conveyed the same to the lessor of the plaintiff, by deed, dated the 19th *January*, 1814. The defendant claimed under a conveyance of lot No. 107, from *George Ten Eyck* to himself, dated the 7th of *April*, 1810, and proved that the premises in question were comprehended within the boundaries of that deed; that he took possession under that deed, in about a month after its

(a) *Vide Tuttle v. Jackson*, 6 *Wendell's Rep.* 213.



execution, and had since continued in possession. The judge decided, that the possession of the defendant being adverse, the deed to the lessor of the plaintiff was void, and the jury accordingly found a verdict for the defendant.

The plaintiff now moved for a new trial, and the cause was submitted to the Court without argument.

NEW-YORK,  
Oct. 1816.

BANCROFT  
v.  
WARDWELL.

*Per Curiam.* The premises in question are claimed as being a part of lot No. 106, in *Klock* and *Nellis's* patent, and the lessor of the plaintiff makes title to the same, under proceedings in partition, by which it appears, that lot No. 107 was ordered to be sold, and a deed was given for it by the commissioners, bearing date the 19th of *January*, 1814. No part of the proceedings are particularly set out. But it is not pretended that the defendant was a party to those proceedings; and he claims title to the same premises, under a deed from *George Ten Eyck*, bearing date the 17th of *April*, 1810, by which the premises in question are described as lot No. 107, in the subdivision of the patent, and are further described by metes and bounds, so as to include the premises in question; it also appears, that soon after the deed was given, the defendant \*entered into possession of the premises, and has continued in possession ever since. The deed given by the commissioners is conclusive only upon all the owners named in the proceedings, or who have received the notice required by the act, (1 *N. R. L.* 510. s. 5.) (a) and those claiming under such persons. But from any thing that appears, the defendant is a total stranger to such proceedings, and is protected under the proviso to the third section of the act, which declares, that such partition shall not preclude any person not named therein, and who shall claim any right or title to the premises in question, from controverting the title or interest of the parties between whom such partition has been made. The testimony shows, very clearly, that the premises were held adversely by the defendant at the time of the sale by the commissioners, and their deed, of course, could not pass any title. The verdict found by the jury for the defendant was correct, and the motion for a new trial must be denied.

[ \* 489 ]

Motion denied.

(a) 2 *R. S.* 322. 3.

### BANCROFT and wife against WARDWELL.

THIS was an action of *assumpsit*, for use and occupation, which was tried before Mr. Justice *Van Ness*, at the *Oneida* circuit, in *June*, 1816.

An action for use and occupation can only be brought when

tion of landlord and tenant exists between the parties; and it will not lie against a person who under the plaintiff as a purchaser from him. (b)

(b) *Featherstonhaugh v. Bradshaw*, 1 *Wendell's Rep.* 134. *Abeel v. Radcliff*, 15 *Johns. R.* *Jackson v. Miller*, 7 *Cowen*, 747. *Jackson v. Moncrief*, 5 *Wendell*, 26.

NEW-YORK,  
Oct. 1816.

BANCROFT  
v.  
WARDWELL.

[ \* 490 ]

The premises in question were situate in the town of *Rome*, in the county of *Oneida*, and were part of certain lands which had been held by one *Hawes*, under a lease for three lives, who died leaving several children, his heirs at law, and a widow who was now the wife of the plaintiff, whose dower was assigned to her in severalty by the heirs, which the plaintiff had improved and leased, reserving the rents, for several years, until 1812. One *Peck*, a witness on the part of the plaintiffs, testified, that the large lot, of which the premises are a part, was held in different proportions by several tenants, among whom was the defendant, under a lease from *John Lansing, jun.*; that the witness, by the defendant's orders, had taken possession of his part \*of the large lot, which lay in *Rome*, and fenced in, and cultivated, a certain piece, called the rye-field, containing 18 or 20 acres, which had for several years been unenclosed, and about one third of which had been assigned to Mrs. *Bancroft*; that the next year the plaintiff, *Bancroft*, called on the witness, and said that he thought the defendant ought to pay him something for his right in the lot, or do something about his claim to it, and wished to sell it. To this the witness replied, that he had no authority from the defendant to make any bargain for him; that the witness, at *Bancroft's* request, wrote to the defendant, stating, in substance, what *Bancroft* had said, and wishing his directions, to which he shortly after received a letter in reply, directing him to take possession, at all events, of the remainder of the same, including the residue of the land claimed by the plaintiffs, and that he, the defendant, would do what was right about it; that the witness, accordingly, took possession of a piece of land, called the elder lot, which was then unenclosed, and cleared it, and fenced it, with the consent of the plaintiffs, under the above-mentioned arrangement; that the defendant soon after arrived from *Rhode-Island*, where he then resided, and on *Bancroft's* proposing to sell his wife's right, the defendant said that the plaintiffs had no right to the land claimed by them, and ought to pay him for waste committed upon it; that the witness had never heard *Bancroft* make any claim for the use and occupation of the premises, but merely wished to sell his claim in right of his wife's dower, and that the defendant had improved the land, until the time that this suit was brought. Another witness for the plaintiffs stated, that he was present at conversations between *Bancroft* and the defendant, in which the former never pretended that he had any claim to demand rent of the defendant, but his only object was that the defendant should pay him something on a purchase of his claim, and in that way extinguish it, and that *Bancroft* said, that he supposed that the defendant would give him something for his claim, in consequence of the letter which he had written to *Peck*; that the defendant replied, that *Bancroft* had committed great waste upon the land, and that he had no right to it, and, therefore, he considered himself under no obligation to give

him any thing for his claim, but that *Bancroft* ought to pay him for the waste.

Upon this evidence, the judge directed the plaintiffs to be \*nonsuited; and they now moved the Court to set aside the nonsuit.

*Storrs*, for the plaintiffs, contended, that the statute intended to afford a liberal remedy against tenants, and that wherever a tenancy exists, the action for use and occupation would lie. That, unless there was a contract of sale, the defendant must be considered as a tenant at will. That there being no terms, or price, or quantity of land agreed upon, there could be no contract of sale. That this case was distinguishable from that of *Smith v. Stewart*,† where the defendant entered under color of a title that could be enforced in a Court of equity. The defendant is a tenant at will,‡ without a reservation of rent. The plaintiffs are not bound to treat him as a trespasser. It is enough that the defendant himself, or by his agent, occupies the land.§ If the defendant cannot, in this action, dispute the plaintiff's title, it must be on the ground of tenancy.

*Talcot*, contra, insisted, that the defendant did not, in any manner, enter into possession under the plaintiffs, so as to create the relation of landlord and tenant; and that the case of *Smith v. Stewart* was directly in point. In *Kirtland v. Pounsett*,|| the Court of Common Pleas, in *England*, decided, that if a purchaser takes possession under a contract of sale, which, afterwards, on account of some defect in the vendor's title, is not executed, the vendor cannot recover for the use and occupation for the time the vendee was in possession.

Again; this action should have been by the husband alone. Though the defendant cannot dispute the title of the plaintiff in this action, he may deny that the wife has any interest. The promise, if any, was made to the husband, not to the wife; and without an express promise to her, she cannot be joined.¶ There was no estate of which she could be endowed.†† The husband alone has an action of debt for rent.‡‡

*Per Curiam*. This is a motion to set aside a nonsuit granted at the trial. The action is for use and occupation; and the question is, whether the evidence was sufficient to support the action. It is a well-settled principle, that this action cannot be sustained, unless the relation of landlord and tenant exists between the parties. But the facts in this case furnish no \*evidence of any such relation. If the defendant could be considered as holding at all, under, or by the permission of, the plaintiffs, it was as a purchaser, and not as a tenant. Such holding is not enough to maintain this action, according to the decision of the Court in the case of *Smith v. Stewart*, (6 *Johns*. 49.) There were no facts from which a tenancy could be inferred, and, therefore, nothing which ought to have been submitted to the

NEW-YORK,  
Oct. 1816.

BANCROFT  
v.  
WARDWELL.  
[ \* 491 ]

† 6 *Johns. Rep.*  
46.

‡ *Jackson v. Bradt*, 2 *Caines*,  
169.

§ *Common on*  
*Con. 511.1 Esp.*  
*Cases, 55. Bl.*  
323.

|| 2 *Tassd.*  
*Rep.* 145.

¶ 1 *Salk.* 112.  
2 *Wm. Bl. Rep.*  
1236.

†† 1 *Cruise's*  
*Dig.* 181.

‡‡ *Vin. Ab.*  
*Baron et Feme*,  
(2) *pl.* 8. *note*,  
*pl.* 12.

[ \* 492 ]

NEW-YORK,  
Oct. 1816.

YORDAN  
v.  
HESS.

jury. The first application made by *Bancroft* to the defendant's agent, was to *sell* his claim to the land in question, and which then lay in common. Neither the letter written by the agent to the defendant, nor the answer, intimate any agreement to take possession as tenant. But the defendant directs his agent to take possession, at all events, and he would do what was right about it, when he came up. The possession was afterwards taken, with the consent of the plaintiffs, and under the above arrangement. The defendant never had consented to any arrangement, other than to do what was right about it, and the only proposition made by the plaintiffs was to sell; and it was impossible, from these facts, to infer any agreement that could create the relation of landlord and tenant. The motion to set aside the nonsuit, must, therefore, be denied.

Motion denied.

### YORDAN against HESS.

A note was drawn payable to A. and B., which was held by C., who wished to sell the note to D., but D. refused to take it, unless endorsed by A.

[ \* 493 ]  
and B.: A. refused to endorse it, unless he received security for his indemnification, which it was agreed to give, and the note was sold to D., at a discount of 20 per cent. It being understood between B. and C. that part of the money thus raised should be lent to B., B. drew a note payable to C., or bearer, for the amount actually received by him from C., with an addition of 20 per cent. on that amount, and interest thereon from the date, which last-mentioned note was deposited with A., as his security: in an action by A. against B. upon this note, it was held that it was usurious and void.

THIS was an action of *assumpsit*, against the defendant as maker of a promissory note. The cause was tried before Mr. Justice *Van Ness*, at the *Otsego* circuit, in *June*, 1816.

On or about the 6th of *March*, 1813, one *Williams* had made a note for 343 dollars 25 cents, payable to the plaintiff and defendant in this suit, on or before the first of *March*, 1814; which note was given for the use of *Henry S. Yordan*. *Henry S. Yordan*, \*and the defendant, then proposed to sell the note to one *Braman*, at a discount of about 60 dollars, but *Braman* refused to purchase it, unless the plaintiff and defendant would endorse it, and the plaintiff refused to endorse it, unless he was indemnified. It being understood between the defendant and *Henry S. Yordan*, that the latter should lend the defendant part of the money to be raised on the note, it was agreed that the note which was to be given by *Hess* to *Henry S. Yordan*, should be placed in the hands of the defendant as his security. The discount of the note made by *Williams* was effected, and a note was then executed by the defendant, dated *March* 6th, 1813, to *Henry S. Yordan*, or bearer, for 246 dollars and 67 cents, with interest from the date; and upon this note the present suit was brought. The plaintiff, on receiving this note, gave a receipt for it to *Henry S. Yordan*, with an agreement to return it,

An attorney or counsel cannot testify as to communications made by a client, whilst the relation of attorney or counsel and client subsists. But if, after that relation has ceased, the former client repeat to his attorney, voluntarily, and without any artifice being used by the latter, communications previously made, the attorney is a competent witness as to such subsequent communications. (a)

(a) Extract of the privilege of a client in relation to confidential communications to his counsel. 3 *Johns Cas.* 198. 1 *Caines's Rep.* 157 258 14 *Johns Rep.* 391. 17 *Id.* 335. 18 *Id.* 330. 19 *Id.* 134. 2 *Cowen*, 108.

when he should be indemnified against his endorsement. The plaintiff had been sued as endorser of the note made by *Williams*, but the suit was compromised, upon his agreeing to remain ultimately responsible in case of its not being paid by the defendant. On this evidence, the defendant's counsel contended, that the plaintiff had not such an interest in the note in question as to enable him to maintain an action against the maker of it; but the judge overruled the objection.

*James Brackett*, a witness on the part of the defendant, testified, that he had heard both the plaintiff and defendant state, that, when they sold *Williams's* note to *Braman*, a discount of 20 per cent. was made, and a sum in the like proportion was added to the note on which this suit was brought, over and above the amount actually received by the defendant from *Henry S. Yordan*. These facts the witness learned from the parties in this suit, while he was their attorney and counsel, in suits brought against them by *Braman* on *Williams's* note; and the witness stated, that, after he had ceased to be their attorney and counsel, he had twice heard the plaintiff admit, that the note in question was given for a larger sum than the defendant had actually received; at one time, he said that the defendant had only received 240 dollars; at another time, that he had only received 220 dollars. The testimony of *Brackett* was objected to by the counsel for the plaintiff, on the ground that the disclosures were made to him while he was the attorney and counsel for the plaintiff, and that the subsequent disclosures were nothing more than a repetition of what had been stated to him whilst he stood in that relation to the plaintiff; and that, at all events, the note was not usurious. The judge, however, without deciding on the admissibility of the evidence, was of opinion, that the facts, if duly proved, constituted a case of usury; and a verdict was taken, by his direction, subject to the opinion of the Court. The case was submitted to the Court without argument.

NEW-YORK,  
Oct. 1816.

YORDAN  
v.  
HESS.

[ \* 494 ]

*Per Curiam.* If the testimony of *Brackett* was admissible, it must fully establish the usury. The plaintiff twice admitted to this witness that the note was given for a greater sum than was received by the defendant. That the money was raised by a sale of *Williams's* note, at a discount, furnishes no legal excuse for imposing that loss on the defendant. With respect to the testimony of *Brackett*, it does not fall within the rule which protects the client from a disclosure of any communications made by him to his attorney. The confessions by the plaintiff to *Brackett* were made after he ceased to be his attorney; and although they were, substantially, a reiteration of what had been communicated, whilst the relation of attorney and client existed, yet they appear to have been voluntary disclosures, no way sought for, or drawn out, by the witness. An attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity. But this is the privilege

NEW-YORK.  
Oct. 1816

JACKSON  
v.  
STEPHENS.

of the client; and if he chooses, after this relation has ceased, to volunteer any communications, he is not protected, although they may be, in substance, the same as were given whilst that relation subsisted. The reason of the rule then ceases. If a repetition of the information should appear to have been drawn out by any artifice, for the purpose of being used as evidence, it ought not to be received. But when it is perfectly voluntary, and unsought for, there can be no solid ground for excluding the evidence. The defendant is, accordingly, entitled to judgment.

Judgment for the defendant.

[\* 495]

\*JACKSON, *ex dem.* BEEKMAN, against STEPHENS.

The construction heretofore given to the *Kayaderosseras* patent, is not to be called in question. The true northwesternmost head of the *Kayaderosseras* creek, is that adopted by the commissioners, for the division of the patent, in 1770; and *Baker's* falls are the "third falls on the *Albany* river," mentioned in that patent.

Where a question of adverse possession was not, on the trial, submitted to the jury, it will be presumed to have been abandoned, and cannot be made a ground of moving for a new trial. (a)

THIS was an action of ejectment brought to recover part of lot No. 4, in lot No. 1, in lot No. 13, in the 25th allotment of the patent of *Kayaderosseras*. The cause was tried at the *Saratoga* circuit, in *May*, 1815.

The principal question in this case was, whether the commissioners, who, in 1770, ran the boundaries of the *Kayaderosseras* patent, had taken the true northwesternmost head of the *Kayaderosseras* creek, and had run the line described in the patent as follows, correctly: "thence northerly to the northwesternmost head of a creek called *Kayaderosseras*, about fourteen miles, more or less; thence eight miles northerly, thence easterly to the third falls in *Albany* river, about twenty miles, more or less." If the location made by the commissioners was correct, the plaintiff was entitled to recover the premises in question, to which he deduced a regular title under the *Kayaderosseras* patent. A variety of evidence was given on the trial, to support and impugn that location, and to show an adverse possession in the defendant, which, however, it is unnecessary to state. A verdict was taken for the plaintiff, and the defendant moved to have it set aside, and a new trial granted.

*Skinner*, for the defendant.

*J. Enott*, contra.

*Per Curiam.* The construction to be given to the *Kayaderosseras* patent has been too long and well settled to be again called in question. The cases of *Jackson v. Lindsey*, (3 *Johns. Cas.* 86.) and *Jackson v. Ogden*, (1 *Johns. Rep.* 156.) show, that the place adopted by the commissioners is to be deemed the northwesternmost head of the *Kayaderosseras*; and that the course from thence, eight miles more northerly, must be a due north course. It is admitted that the third falls mentioned in the patent are those called *Baker's* falls; and running the line according to these objects, will, confessedly, include the premises

(a) Vide *Jackson v. Davis*, 5 *Coven*, 123. *Jackson v. Cody*, 9 *Coven*, 140.

in question within the patent. The lessor of the plaintiff, having \*deduced a regular title to himself, he is entitled to recover, unless the defendant is protected by his length of possession. On this point there might have been some reason to doubt, had it been made a question upon the trial. Whether there had been a twenty years' adverse possession or not, was matter proper for the determination of the jury; and the case furnishes pretty strong evidence on this point, at least up to what is called the middle line. But as the question does not appear to have been at all submitted to the jury, we must presume it was abandoned upon the trial, and the motion for a new trial must be denied.

Motion denied.

NEW-YORK.  
Oct. 1816.

SHEAR  
v.  
OVERSEERS OF  
HILLSDALE.  
[ \* 496 ]

**SHEAR against MALLORY and BRYANT, Overseers of the Poor of the Town of Hillsdale.**

IN ERROR, on *certiorari* to a justice's Court.

The defendants in error, who were plaintiffs in the Court below, brought an action against the plaintiff in error, on a promise alleged to have been made by him, for the maintenance of a bastard child, born of the body of his daughter. It appeared, on the trial, that the defendant below had taken out a warrant against the putative father of the bastard child, and that, when he was arrested, the defendant settled with him, and took his note; and no further proceedings appear to have been had against the putative father. It also appeared, that the defendant had, at several times, acknowledged that he had to maintain the child, and that he had promised one *Hogeboom*, who had married the mother of the child, that if he would give up the property which the defendant had given the mother, he, the defendant, would maintain the child, and that *Hogeboom* did give up the property. The overseers had expended more than twenty-five dollars in the support of the child. Judgment was given in the Court below for the defendants in error.

*Per Curiam.* The promise made by the defendant below, to maintain the bastard child, cannot be made to *enure* to the benefit \*of the plaintiffs below. In general, it is necessary that the consideration on which a promise is founded, should move from the party in whose favor the promise is made. There are some cases, however, where a party in whose favor the promise is made, may maintain an action, although the consideration moves from another person; but, in the present case, the consideration did not move from the plaintiffs below, nor was the promise made to them, or for their benefit. It does not appear that they were the overseers of the poor at the time the putative father

Although, in some cases, an action may be maintained on a promise, the consideration for which moves from a third person, by the party in whose favor the promise was made, yet, when neither the consideration moves from the plaintiff, nor the promise was made to him, or for his benefit, an action cannot be maintained. (a)

Where a promise is made to the overseers of the poor, their successors cannot maintain an action upon it, they not being a corporation. (b)

[ \* 497 ]

(a) Vide *Foresth v. Ganson*, 5 *Wendell's Rep.* 560.

(b) Sed vide *Overseers of Pittstown v. Overseers of Plattsburgh*, 15 *Johns. Rep.* 436. S. C. 18. *Id.* 407. See, also, 18 *Johns. Rep.* 122. 332.

NEW-YORK,  
Oct. 1816.

SICKLES  
v.  
SHARP.

was proceeded against, and, admitting that the promise to maintain this child enured to the benefit of the then overseers, they are not a body corporate so that their successors can sue in their own name upon such promise. The judgment must therefore, be reversed.

Judgment reversed.

### SICKLES *against* SHARP.

Fishing on a Sunday, in the channel of Hudson river, between the city of New-York and Baker's falls, is a violation of the Act to protect the fishing in Hudson river, &c. Sess. 38. ch. 146. s. 4. (b)

A statute penal as to some persons, if it is generally beneficial, may be equitably construed. (c)

THIS was an action of debt, to recover the penalty of 50 dollars, given by the sixth section of the act to protect the fishing in Hudson river, &c., passed the 11th April, 1815, (Sess. 38. ch. 146.) (a) for a violation of the fourth section of the act.

It was admitted that the defendant, on Sunday, to wit, on the 5th May last, fished, with a seine, in Hudson river, in the channel thereof, in the town of Kinderhook, and caught three hundred shad.

The case was submitted to the Court without argument.

SPENCER, J., delivered the opinion of the Court. The first section of the act (Sess. 38. ch. 146.) (a) prohibits, after the first of June, 1815, the use of set-nets or wires for catching fish, in any part of the Hudson river, between the city of New-York and Baker's falls, other than hoop-nets, fikes, or set-nets, constructed with buoys, which are to be used only on the flats, along the flats and shores, and out of the channel of the river. The second section prescribes the penalty for offending against the provisions of the first section; and the third section directs the removal of poles already set. The fourth section, upon which this suit is founded, declares it to be unlawful for any person to fish with seines, &c., in any other part of Hudson river, or in the waters of this state, at or below the city of New-York, after sunset on Saturday in each week, until the rising of the sun on the Monday following; and a subsequent section inflicts a penalty of fifty dollars for the offence.

It has been contended, that the fourth section of the act prohibits only such fishing upon the Hudson river, above Baker's falls, inasmuch as the preceding sections had mentioned no other part of the river than that between the city of New-York and Baker's falls.

The rule that penal statutes are to be construed strictly, when they act on the offender, and inflict a penalty, admits of some qualification. In the construction of statutes of this description, it has been often held that the plain and manifest intention of the legislature ought to be regarded. A statute which is penal to some persons, provided it is beneficial gener-

(a) 1 R. S. 687.

(b) Rogers v. Jones, 1 Wendell's Rep. 237.

(c) Van Valkenburg v. Terry, 7 Cow. Rep. 252. Myers v. Foster, 6 Cowen, 567.



ally, may be equitably construed. Even in cases of felony, Courts have regarded the intention of the legislature. The statute of *Geo. II. ch. 25. sec. 3.*, enacts, that it shall be felony to steal *any bank notes*, and it was adjudged to be felony to steal one bank note. There can be no doubt, in this case, of the intention of the legislature in passing the act. It was to prevent obstructions in the navigation of the river, to prevent the violation of the Sabbath, and to allow one day in the week to the unmolested passage of fish up the river. It is a fact of public notoriety, that shad or herring never pass above *Baker's falls*; and to construe the act in the manner contended for by the defendant's counsel would render it a dead letter. But even if a strict and rigid adherence to the very letter of the statute were necessary, it might be urged, in support of this action, that, as the first section of the act tolerates fishing with nets in a certain manner, on and along the flats and shores, the fourth section, forbidding fishing in any other parts of *Hudson river*, means the channel of the river in its whole extent, as contradistinguished from the flats and shores.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
HALLENBECK

Judgment for the plaintiff.

\*JACKSON, *ex dem.* LIVINGSTON and others, *against* HALLENBECK.

[ \* 499 ]

THIS was an action of ejectment, brought to recover thirty-four acres of land, in lot No. 124, in the *Lunenburg* patent. The cause was tried before Mr. Justice *Platt*, at the *Greene* circuit, in *September*, 1815.

The plaintiff produced in evidence the *Lunenburg* patent, dated the 25th of *May*, 1667, which, by deed, dated the 30th of *July*, 1750, was divided between the proprietors, of whom *Johannes Provoost* and *Abraham Staats* had purchased one third; and in the partition 43 lots had fallen to the share of *Abraham Provoost*, *Sybrant Van Schaak*, and *Jacob Roseboom*, who were the representatives of *Johannes Provoost* and *Abraham Staats*. The representatives of *Provoost* and *Staats*, by deed of partition, dated the 7th of *August*, in the 24 *Geo. II.*, divided their third of the patent, excepting thirteen lots, of which lot No. 124, is one, which it was declared should remain undivided, one half thereof belonging to *Provoost*, and the other half to *Roseboom* and *Van Schaak*. *Abraham Provoost*, by deed, dated the 10th of *August*, 1750, conveyed his lands, in the *Lunenburg* patent,

*A.*, being the owner of certain lands in the *Lunenburg* patent, died, after having devised the same to his wife during her widowhood, remainder to *B.* and his other three brothers: a dispute having arisen between *C.*, the daughter of *B.*, and her husband, and the other devisees of *A.*, as to the portion of land to which she was entitled, her portion was ascertained and conveyed, in 1772, to *C.*'s husband; and

certain persons were appointed by the deed to locate and reduce to severalty her share, on any of the lands within the patent in the possession of the parties of the first part, or their tenants; the defendant entered upon the premises in question, 23 years before the trial, claiming title under the husband of *C.*; and in an action of ejectment by persons claiming under *A.*, it was held that there was such an adverse possession in the defendant as barred the action, which could not be repelled by showing that he had obtained his possession from the tenants of the lessors of the plaintiff, or their ancestors, as it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of *C.* had located it upon land in the possession of tenants, as they were authorized to do.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
HALLENBECK.

to his eldest son and heir at law, *Johannes*, who died leaving four brothers; *Samuel*, the eldest, and heir at law, *Hendrick*, *Jacob*, and *Isaac*; and *Samuel* had issue, *Hendrick* and *Catharine*, of whom there are no descendants living. *Abraham Provoost*, one of the lessors of the plaintiff, is the son of *Jacob Provoost*, and is the only one of the family now surviving. The title of the other lessors of the plaintiff, as far as can be collected from the case, it is unnecessary to state.

The defendant gave in evidence the will of *Johannes Provoost*, dated *November 5th*, 1751, who devised all his estate to *Catharine*, his wife, during her widowhood, remainder to his four brothers, *Hendrick*, *Samuel*, *Jacob*, and *Isaac*, in fee. *Sarah*, who married *John Low*, was the daughter and heir at law of *Jacob Provoost*. The defendant also gave in evidence a deed, dated *June 25th*, 1772, from *Catharine Provoost*, widow of *Johannes Provoost*, *Samuel Provoost*, and *Isaac Provoost*, to *John Low*, and *Killian Van Rensselaer*, which recited that disputes had arisen between the devisees of *Johannes Provoost*, and *John Low*, and *Sarah*, his wife, as to her proportion in the *\*Lunenburg* patent, and that, for the purpose of settling these disputes, *Low* and his wife had, by deeds of lease and release, bearing date the 3d and 4th of *February*, 1772, granted to *Killian Van Rensselaer* all their interest in the patent, in trust, and to the uses in the said deed of release mentioned; the parties then covenanted, that the parties of the second part were entitled, under *Johannes Provoost*, and otherwise, to one equal undivided fourth part of one equal undivided sixth part, and also to one equal sixth undivided part of one other equal undivided sixth part of the lands granted by the said letters patent; and that *Robert Yates*, *Nanning Vischer*, and *Gysbert Marsellis, jun.*, and any two of them, were authorized, with all convenient speed, to locate, and reduce to severalty, the several undivided tracts, above granted, in, from, and out of, the lands now in the tenure and occupation of the parties of the first part, their tenants or assigns, and out of the lands parcel of the said tract, which, by any former division, had been allotted to the parties of the first part, or to any person under whom they claim or derive title to the said tract, and out of such parts of the said tract, which had, on such division, been allotted to the rights of *Johannes Provoost*, the grandfather of his son, *Abraham Provoost*, or any persons claiming under them; and in case of deficiency, then such deficiency to be taken out of such lands as remain in common and undivided in the said patent. The defendant then gave in evidence a deed from *Killian Van Rensselaer*, to *Casper I. Hallenbeck*, for lot No. 81, in the patent of *Lunenburg*, dated *September 21st*, 1774, and the will of *Casper I. Hallenbeck*, dated *September 4th*, 1795, by which he devised to the defendant, his son.

It was proved by *John C. Hallenbeck*, that the defendant's father was in possession of the land which he occupied, in lot

No. 124, 23 years before the trial, and claimed under a purchase from *Low*. It also appeared that *Peter Bastian*, a negro, and one *Egbertson*, were in possession each of a few acres of the premises, when the defendant's father entered. They held under *Johannes Provoost* and paid their rent in mowing and work, and the defendant's father obtained the possession from them. At the time the defendant's father took possession of the premises, *Isaac Provoost* lived within a mile and a quarter of lot No. 124, and *Abraham Provoost* lived within two miles, and afterwards within a quarter of a mile.

\*The plaintiff, on the trial, abandoned his claim to that part of the premises which was originally possessed by the defendant's father, in lot No. 81, and a verdict was taken for the residue, subject to the opinion of the Court.

*E. Williams*, and *Fraser*, for the plaintiffs. They cited 1 *Johns. Rep.* 156. 3 *Johns. Rep.* 499. 6 *Johns. Rep.* 34. 9 *Johns. Rep.* 174. 10 *Johns. Rep.* 475.

*Van Buren*, (attorney-general,) and *Van Vechten*, contra.

THOMPSON, Ch. J., delivered the opinion of the Court. The premises in question are about 34 acres of land, in lot No. 124, in the *Lunenburg* patent. The case does not disclose who are the lessors of the plaintiff, and we cannot, therefore, say whether they have made out a title in themselves. If, however, the decision of the case turned upon the question of title, it might be proper to call upon the parties for this information. But, for the present, we assume, that such title is made out in some of the lessors, so as to entitle the plaintiff to recover, were it not for the adverse possession shown on the part of the defendant. From this testimony, it appears that the first occupants of the premises were *Peter Bastian* and *Jacob Egbertson*, and upon the nature of this possession, and the manner in which it was afterwards acquired by the defendant's ancestor, will, in a great measure, depend the result of this suit. From the testimony of *John C. Hallenbeck*, it appears that *Casper I. Hallenbeck*, the father of the defendant, obtained possession in part from *Bastian*, and in part from *Egbertson*, claiming the land, however, under a purchase from *John Low*. On the part of the plaintiff, it is contended, that *Bastian* and *Egbertson* were the tenants of *Johannes Provoost*, under whom the lessors of the plaintiff claim, and, therefore, the attornment to *Hallenbeck* was void.

To a right understanding of the nature of the possession, it will be proper to notice the relation in which *Low*, under whom the defendant claims, stood to the *Provoosts*, and how his right originated. He, it appears, married *Sarah Provoost*, the daughter and heir at law of *Jacob Provoost*, who, together with *Samuel* and *Isaac Provoost*, were the devisees in the will of *Johannes*

NEW-YORK,  
Oct. 1816.

JACKSON  
V.  
HALLENBECK

[ \* 501 ]

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
HALLENBECK.

*Provoost*, dated in the year 1751. There \*being a dispute as to what right *Sarah* had in the land of her grandfather, *Johannes*, the other devisees, *Isaac* and *Samuel*, together with the widow of *Johannes*, in the year 1772, conveyed to *John Low* and *Killian Van Rensselaer* one fourth of a sixth, and one sixth of a sixth, of the lands granted in the patent, to be located by *Robert Yates*, *Nanning Vischer*, and *Gysbert Marsellis*, on any lands they should think proper, either in the possession of the parties of the first part, or their tenants, and either on any lands that had been allotted to *Johannes*, their grandfather, or to his son *Abraham*, and in case of any deficiency, then to be taken out of any lands which lay in common and undivided. It appears, that the possession taken by *Casper I. Hallenbeck*, claiming under a purchase from *Low*, was more than 20 years before this suit was brought. Under this state of facts, no great weight is to be attached to the alleged tenancy of *Bastian* and *Egbertson*. The extent of their improvements was very inconsiderable. *Bastian* was a negro man, formerly owned by *Johannes Provoost*, and, as the case states, paid his rent in mowing. *Egbertson*, also, paid some trifling rent in work. He has, however, been dead nearly 30 years, and *Samuel Provoost*, (to whom the rent is said to have been paid,) nearly 40 years, which makes it, at all events, a very stale tenancy. But admitting they might be considered tenants of *Provoost*, it would not necessarily follow that the possession taken from them by *Hallenbeck* was fraudulent and void. *Low*, also, claimed to derive his title from *Johannes Provoost*, in right of his wife *Sarah*, under the deed of 1772. And, under this deed, the persons appointed to locate *Sarah's* right, had authority to make such location upon any part of the land, whether in the occupation of a tenant or not; and after such a lapse of time, and such a length of possession, it is no more than reasonable to presume such location to have been made upon the premises, and possession taken under such right. This presumption is very much strengthened by the circumstance, that when *Casper I. Hallenbeck* took the possession, *Isaac* and *Abraham Provoost* lived near the premises, and no objection appears to have been made. Under these circumstances, the tenancy set up in *Bastian* and *Egbertson* is too vague and equivocal to work any prejudice to the defendant's possession; and this possession having been taken, under claim of title from *Low*, and held for \*more than 20 years, the defendant ought not now to be disturbed, and is, accordingly, entitled to judgment.

[ \* 503 ]

Judgment for the defendant.

PULVER *against* M'INTYRE.IN ERROR, on *certiorari* to a justice's Court.

The plaintiff in error, who was also plaintiff in the Court below, brought an action against the defendant, who was constable, for the escape of one *Johnson*. It appeared on the trial, that the plaintiff obtained judgment against *Johnson*, in a justice's Court, on the 9th of *May*, 1815; that an execution was issued on the same day, and put into the hands of the defendant, whereon *Johnson* was arrested, and permitted by the defendant to go at large for nine days, upon one *Miller* undertaking that, at the expiration of nine days, *Johnson* should surrender himself to the defendant, which was done, and *Johnson* committed to prison. A verdict, and judgment, was given in the Court below for the defendant.

*Per Curiam.* The judgment must be reversed. The constable permitting the defendant to go at large for nine days was a voluntary escape, and the plaintiff's cause of action accrued immediately upon the escape. Although a constable has thirty days in which to serve an execution against the body, yet, if he does serve it within that time, he has no right to permit the defendant to go at large; and his having him in custody at the expiration of the thirty days, will not excuse the escape. The present action was commenced while *Johnson* was at large, and before he surrendered himself to the constable, pursuant to his agreement.

Judgment reversed.

NEW-YORK,  
Oct. 1816.JACKSON  
v.  
LEWIS.

Where an execution is issued out of a justice's Court, against the body of a defendant, although the constable has thirty days within which to serve it, yet if he arrests him during that time, it will be an escape to suffer him to go at large, which will not be excused by his having the defendant in custody at the expiration of the thirty days.

\*JACKSON, *ex dem.* BOYD, *against* LEWIS.

[\* 504]

THIS was an action of ejectment, brought to recover lot No. 94, in the town of *Brutus*, now *Mentz*, in the county of *Cayuga*, in the *military* tract. The cause was tried before Mr. Justice *Yates*, at the last *June* circuit, in the county of *Cayuga*.

Both parties derived their title from *Bevins*, a soldier; and the plaintiff produced a deed from *Bevins* to *Benjamin Wallace*, dated the 2d of *March*, 1796, which was duly acknowledged on

ses to a deed, both of whom were dead at the time of trial, and the hand-writing of *A.* was proved, and also that he had signed the name of *B.*, and there were two acknowledgments upon the deed, one of which stated that he and *B.* both signed as witnesses, and the other, and later acknowledgment, stated, that *A.* had signed the name of *B.* in his presence, and at his request; it was held that there was sufficient proof of the execution of the deed, and that the first certificate could only go to impeach the credit of *A.*, which was matter for the jury, on the question, whether the grantor had executed the deed or not; but that the reasonable supposition was, that the officer had made a mistake in the form of the certificate. (a)

By the 8th section of the act to settle disputes concerning the titles to lands in the county of *Onondaga* infants have three years after their coming of age in which to file their dissent, and are not, like adults, laboring under no disability, restricted to two years, but, after filing their dissent, they are to give notice to the commissioners, to commence a suit within three years, &c., according to the directions of the third section of the statute. (1 N. R. L. 213. 215.) (b)

(a) *Jackson v. Cody*, 9 Cow. Rep. 140.(b) 3 R. S. 190.  
413

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
LEWIS.

the day of the date, and recorded in the clerk's office of the county in which the land then lay, on the 21st of *April*, 1796. He also produced an award of the *Onondaga* commissioners, dated the 29th of *August*, 1798, by which the premises were awarded to *Wallace*; also, a deed from *Wallace* and his wife, to the lessor of the plaintiff, which were duly acknowledged on the 4th of *October*, in the same year, and recorded in the clerk's office of the county of *Cayuga*, on the 12th of *May*, 1806.

The defendant produced in evidence a deed from *Bevins* to *Henry Hart*, dated the 9th of *March*, 1784, in which a consideration of ten pounds was expressed, and the subscribing witnesses to which were *Anthony B. Bradt* and *Reyner Visger* both of whom were dead at the time of the trial. The signature of the grantor consisted merely of a mark. This deed was duly deposited in the proper office, at that time, for depositing deeds relating to the military lands, on the 25th of *April*, 1795. The hand-writing of *Visger*, one of the subscribing witnesses, was proved by two witnesses, who were of opinion, that the name of *Bradt*, the other subscribing witness, was in the hand-writing of *Visger*. The declarations of *Bevins*, that he had sold the land to *Hart*, and had received in payment a hat, a vest pattern, and a plug of tobacco, were proved by two witnesses; the credit of one of whom, *Catharine Bassett*, the plaintiff offered to impeach, by proving that in her younger days she had been a public prostitute; but the evidence was overruled by the Court. *Herman Vischer Hart* was the heir at law of *Henry Hart*, now deceased. He was born on the 7th of *September*, 1784, and on the 7th of *March*, 1808, filed his dissent to the award of the commissioners in favor of *Wallace*. The plaintiff's \*counsel objected to the dissent given in evidence, on the ground that it had not been filed within two years after *Herman V. Hart* came of age; but the judge decided that it was filed in time. The defendant was in possession of the premises, by virtue of an agreement with *H. V. Hart* for the purchase of the land.

[ \* 505 ]

Upon the deed from *Bevins* to *Henry Hart*, two acknowledgments were endorsed, one of which was taken before *Henry Oothout*, a judge of the common pleas of the county of *Albany*, on the 19th of *April*, 1785, and stated, that *Visger*, appearing before him, and being sworn, said that he saw *Bevins* execute and deliver the instrument, and that "*Anthony B. Bradt*, the other subscribing witness, was present, and did, together with the deponent, sign his name as witness to the execution thereof." The other was taken before *Jeremiah Lansing*, master in chancery, on the 2d of *December*, 1794, which stated, that *Visger* deposed before him, "that he saw *John Bevins* sign his name by making his mark, and that he sealed and delivered the same for the purposes therein mentioned, and that he, the deponent, also subscribed the name of *Anthony B. Bradt*, as witness, for, and by order of, the said *Anthony*, who was present."

The plaintiff's counsel, on the trial, objected to the deed being

admitted in evidence ; but the judge overruled the objection, and charged the jury, that the only question for their consideration was, whether *Bevins* executed the deed to *Hart* ; and told them, that the only reasonable construction which they could put upon the acknowledgments was, that the inaccuracies in them were made by mistake. The jury accordingly found a verdict for the defendant, which the plaintiff now moved to have set aside, and a new trial granted. The cause was submitted to the Court without argument.

NI W-YORK  
Oct. 1816.

JACKSON  
v.  
LEWIS.

THOMPSON, Ch. J., delivered the opinion of the Court. 1. There can be no doubt, that the evidence offered to impeach the character of *Catharine Bassett* was inadmissible. It would not be competent to prove, that she was now a public prostitute, and much less to inquire whether she was so in her younger days ; the inquiry should have been as to her character for truth and veracity. At all events, this should have been the principal and first inquiry ; but that was not attempted ; the inquiry \*as to any particular immoral conduct is not admissible against a witness.

[ \* 506 ]

2. The deed from *Bevins*, the soldier, to *Hart*, was sufficiently proved to go to the jury. The witnesses were both dead, and the hand-writing of *Visger*, one of the witnesses, was fully proved, and the testimony very satisfactorily shows, that the name of *Bradt*, the other subscribing witness, was written by *Visger* ; this did not vitiate the deed. One witness was enough ; the certificate of proof endorsed by Judge *Oothout*, by which it would appear that *Visger* swore that *Bradt* signed his name as a witness, could, at all events, only go to impeach the credit of *Visger* ; this was a matter for the jury, and came within their province, by the submission of the judge to them of the question, whether *Bevins* executed the deed or not. But it ought not even to be considered as impeaching *Visger's* character ; for the reasonable solution was, as the judge told the jury, that it was the mistake of the officer in the form of the certificate.

3. The principal question in the case, however, is as to the dissent, whether *Herman Vischer Hart* had three years after he arrived to the age of 21 to enter such dissent, or only two years. If the dissent was not duly entered, the award, in favor of the title under which the lessor of the plaintiff claims, was established, and became conclusive by the award of the *Onondaga* commissioners. But, with respect to the time which *Hart* had to enter his dissent, I cannot see how any doubt can exist : it must depend upon the construction to be given to the act ; and whether this act be reasonable and just, or founded upon sound policy or not, we are not at liberty to inquire. If it can receive but one interpretation, we are bound to give that to it. By the third section (1 *N. R. L.* 213.) (a) the award is declared conclusive after the expiration of two years from the making thereof,

(a) 3 *R. S.* 191.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
LEWIS.

[ \* 507 ]

unless a dissent shall be entered, and notice thereof given to the commissioners, or filed in the clerk's office of *Onondaga* county, and unless the person dissenting, if not in the actual possession, shall, within *three* years, commence a suit at law or in equity, to recover the lands, or establish his right to the same, and prosecute such suit to effect. But the 8th section contains a proviso, that neither this act, nor any thing therein contained, shall extend, or be construed, to the prejudice of any persons under the age of 21 years, if such persons shall, within *three* years after coming to the age of 21 \*years, make their dissent, and bring their suit, and prosecute the same to effect, as aforesaid. No reasonable construction can be given to this proviso, without considering it as extending the time for entering the dissent, in case of infant claimants, to *three* years, instead of two, as is required by the third section, in case of adults. Upon any other interpretation, the word *three*, in the proviso, must be rejected entirely. The legislature had, undoubtedly, a right to extend the time in favor of infants, if they thought proper, and, indeed, it would seem very reasonable that it should be so done. Two years, in any case, is but a short period for entering a dissent; and the peculiar situation of the titles to the military land, only would, perhaps, justify the statute at all. But considering the time for entering the dissent, in cases coming within the proviso, as extended to three years, then this proviso, and every part of it, is in perfect harmony with the third section. For every thing to be done, after entering the dissent, by persons coming within the proviso, they are referred to, and are to be governed by, the provisions of the third section. But to reject an explicit provision, because reference is made to other parts of the act, for matters not expressly defined, would be against all sound rules of interpretation. The 8th section expressly provides as to the *time* within which the dissent is to be entered; but it is not pointed out how this dissent is to be entered, or within what time, or where the suit is to be brought. The concluding words of the 8th section, "*as aforesaid*," refer to these objects, namely, *make the dissent*, as aforesaid, that is, by giving notice thereof to the commissioners, or by filing the same in the office of the clerk of *Onondaga* county, *and bring the suit*, as aforesaid, that is, within three years, *and prosecute the same to effect*, as aforesaid that is, a suit either at law or in equity, to recover the land, or establish their title to the same. This is the plain and natural interpretation of the statute, and the one adopted by this Court, in the case of *Jackson v. M'Kee*, (8 *Johns. Rep.* 429.) although this point was not the one then directly before the Court. The motion for a new trial must, accordingly, be denied.

Motion denied.



## \*DODGE against LEAN.

NEW-YORK,  
Oct. 1816.DODGE  
v.  
LEAN.

IN ERROR, on *certiorari* to the Justices' Court in the city of New-York.

The plaintiff in error brought an action against the defendant in error in the Court below, and declared against him as surety for *George Herrick* and *George Chapman*, on a certain voyage, and demanded forty dollars, on the ground that the said seamen had not proceeded on that voyage. The declaration also contained a count for money had and received. At the trial, it appeared, that the seamen above mentioned had first engaged themselves on board of the schooner *Juliet*, for a voyage to *Petersburgh, Virginia*, and back, and that the defendant had received ten dollars advance wages, for each of them in that voyage, he being their security; that the voyage was afterwards changed by the owners, with the consent of all the parties, and a new voyage substituted; that the two sailors signed two shipping articles, and that the defendant became surety, by signing his name opposite to the names of the sailors in the column headed "Sureties," and received the further sum of ten dollars for each of them, making, in all, forty dollars, received on account of the shipping articles as security therein. It also appeared that the words "security until the vessel sailed" were written after the name of the defendant, in the column headed "Sureties," by the plaintiff, after the defendant had signed his name, and without his privity; that the defendant delivered up the seamen to the captain of the *Juliet*, before her departure; that they escaped, and were again twice successively delivered up, by the defendant; that, after each time, they escaped, and that the vessel finally departed on her voyage without them.

The Court below gave judgment for the defendant, on the ground that he had not bound himself as security, by such a writing as was valid within the statute of frauds.

*Van Wyck*, for the plaintiff in error.

*Antho*n, contra.

*Per Curiam*. The return to the *certiorari* in this case is so imperfectly made out, that it is impossible to understand it, without \*referring to the affidavit upon which the *certiorari* was allowed. From the return it does not appear how, or in what way, the plaintiff had any concern or interest in the transaction. But, looking at the affidavit, it would seem that he was owner of the vessel, and advanced the money. It was not, however,

Where a person becomes surety to the owner of a vessel, that certain seamen shipped on board the vessel shall proceed upon the voyage, and the seamen receive wages in advance, which they pay to their surety as his indemnity, in case the seamen desert the vessel before the commencement of the voyage, the owner cannot maintain an action for money had and received against the surety, to recover back the wages advanced.

Where, in shipping articles of seamen, a person has signed his name under a column headed "Sureties," but there is no explanation added as to the extent of his undertaking, it is not a sufficient writing within the statute of frauds and the undertaking is void  
(a)

[ \* 509 ]

(a) Every agreement required by the statute to be in writing must be certain in itself, or be capable of being made so by a reference to something whereby the terms can be ascertained with reasonable precision. *Abel v. Radcliff*, supra, 297.

NEW-YORK,  
Oct. 1816.

DODGE  
V.  
LEAN.

advanced by him to the defendant, upon any contract or agreement between them ; it was paid, as advance wages, to the seamen, *Herrick* and *Chapman*. And it is to be collected from the return, the affidavit, and shipping articles, all together, that the money was put into the defendant's hands by the seamen for his indemnity, for becoming security for them, on the shipping articles. The plaintiff, therefore, could not recover on his money count. The money could not, in any way, be considered as in the defendant's hands for the use of the plaintiff. The payment was made to the seamen by the plaintiff, and the defendant received it from them on a contract totally unconnected with the plaintiff. If he has, therefore, any remedy against the defendant, on account of the non-compliance by the seamen with their contract, it must be on his special undertaking as their surety.

To his right to recover on that ground there are several objections. From the return, it appears, that, when the defendant signed his name in the shipping articles, under the head "Sureties," it was unaccompanied with any addition or explanation whatever, for what he was surety ; nor does the return in any way explain the nature or object of the undertaking. If he was surety that the seamen should be put on board the vessel, he fulfilled his undertaking. The words written under the defendant's name, "*surety until the vessel sails*," appear to have been written by the plaintiff himself, after the defendant had signed his name, and without his privity or consent. They must, at all events, be rejected, if they do not totally destroy the instrument, so far as respects the defendant ; and, rejecting these words, there is no proof that the defendant has failed in his undertaking as surety for the seamen. But the defendant's promise required a note or memorandum in writing, within the statute of frauds. It was an undertaking for the default of others ; and his bare signature, under the word surety, was not a sufficient memorandum. It did not, in any manner, show what his agreement was, or for what he became surety. The memorandum ought to state, substantially, what the undertaking of the surety is. The judgment below must, accordingly, be affirmed.

Judgment affirmed.

**\*MOSHER, executor of BRIGGS, against HUBBARD.**NEW-YORK,  
Oct. 1816.MOSHER  
v.  
HUBBARD.

THIS was an action of *assumpsit* upon the common money counts. The defendant pleaded *non assumpsit* and *non assumpsit infra sex annos*. The cause was tried at the *Rensselaer* circuit, in June, 1816.

At the trial, the plaintiff gave in evidence the following order: "Pay *William Briggs* 110 dollars, on sight, and the same shall be passed to your credit, on a bond and mortgage which I hold with *Jesse Potter*, executed by you. Your Friend, *Ruggles Hubbard*. To Mr. *Daniel Eldred*. Troy, November 7th, 1808."

The bond and mortgage referred to in the order were dated the 19th October, 1807, and were assigned by the defendant and *Jesse Potter*, the mortgagees, to *Thomas Sampson* and *Henry Warren*, by assignment, dated the 27th May, 1808; but by a memorandum on the mortgage, the assignment was stated to have been delivered on the 15th December, 1808. *Daniel Eldred* testified that the order in question was presented to him by the plaintiff's testator in his lifetime, but that he had refused to pay it, because the bond and mortgage had been assigned to *Sampson* and *Warren*, and they had told him that he must pay no more to the defendant; that he had paid up the whole amount of the bond and mortgage, and that the order was never paid out of it.

*Jonathan Brown* testified that the bond and mortgage were given to the defendant and *Jesse Potter*, to secure the consideration for the real estate of *John Potter*, sold by them under the surrogate's order; that the order in question was given in part payment of a debt due from the estate of *John Potter* to the plaintiff's testator, and not for an individual debt of the defendant, as the witness had understood from the testator in his lifetime. The witness also testified that he had examined an account on file in the surrogate's office, endorsed by the defendant, after the date of the order, in which was stated an account \*in favor of the plaintiff's testator, against the estate of *Potter*, of about 190 dollars, stated to be receipted and allowed to the defendant by the surrogate. The witness also testified that in April, 1815, he called on the defendant in *Albany*, at the request of the plaintiff, and showed him the order in question, which the defendant admitted that he had given. The witness then told the defendant that the plaintiff had found the

A., the administrator of an intestate estate, under an order of the surrogate, sold certain land of the intestate, and took a bond and mortgage from the purchaser to secure the consideration: he afterwards drew an order upon the purchaser in favor of B., for part of a debt due from his intestate to B., stating in the order that the amount should be credited on the bond and mortgage; but the purchaser refused to pay the order, as the bond and mortgage had been assigned to C.; it was held, that A., having received the full amount of the bond and mortgage from the assignee, and being credited for the amount of the debt to

[\* 511]

B. in his account with the surrogate, was liable in his individual capacity to B., for the amount of the order, as for money had and received to his use.

In an action to recover the amount of an order which had been drawn by the defendant, but which the drawee had refused to pay, the defendant pleaded the statute of limitations, and a witness testified that after the lapse of six years, he presented the order to the defendant, who did not pretend but that the money was due, and said that he did not recollect paying it, but that he would examine his papers, and if he had paid it, he would write to the witness, who, however, never received any communication from the defendant upon the subject; it was held, that this was sufficient evidence from which to imply a promise by the defendant to pay the money, if he should find that it had not been paid; and thus to take the case out of the statute of limitations. (a)

(a) Vide *Lawrence v. Hopkins*, supra, 238, and the cases there cited.

NEW-YORK,  
Oct. 1816.

MOSEER  
v.  
HUBBARD.

order among the papers of his testator, which, the witness had understood from the testator, before his death, had been lost some time; that he had called upon *Eldred*, who said that he had not paid it, and who wanted to know whether the defendant had paid it, and if not, he wished to have it settled. The witness further stated to the defendant that the reason why *Eldred* had not paid the order, was, probably, because the bond and mortgage had been assigned about the time that the order was given; to which the defendant replied, that he supposed that that was the reason. The witness then asked the defendant if he had any recollection of paying it, but the defendant answered that he had not; and on the witness asking what should be done about it, the defendant said that he was in great haste, but that he would examine his papers on his return to *New-York*, and that if he found that he had paid the order, he would write to the witness; but the witness testified that he had never received any letter or communication from the defendant upon the subject, and that the defendant did not pretend but that the money was justly due to the estate of the plaintiff's testator.

The jury, by the direction of the judge, found a verdict for the plaintiff.

A motion was now made to set aside the verdict, and for a new trial.

*Mitchill*, for the defendant, contended, 1. That the plaintiffs were barred by the statute of limitations.

2d. That there was no sufficient consideration proved to support an *assumpsit* by the defendant to pay the debt out of his own proper funds, it being the debt of the intestate, *Potter*; and the order itself, without the words "value received," was no evidence of a consideration.† An executor or administrator can give no preference to one debt over another of equal degree, except by payment, or confessing a judgment.

\*3. That there was not a sufficient memorandum in writing, within the eleventh section of the statute of frauds, to charge the defendant in his own right.‡

4. That the defendant having effects in the hands of the drawee, notice of the non-payment of the order was necessary.§

*Foot*, contra, relied on the case of *Sluby v. Champlin*,|| to show that the evidence of a promise by the defendant was sufficient to take the case out of the statute of limitations. And he contended that, at any rate, there was sufficient evidence to enable the plaintiff to recover on the count for money had and received.

*Per Curiam*. Several questions were raised and discussed on the argument, which it will be unnecessary to notice, as the

† *Rann v. Hughes*, 7 Term Rep. 350. note. *Ballard v. Wal-*

[ \* 512 ]  
ker, 3 Johns. Cas. 65. *Bears v. Brinks*, 3 Johns. Rep. 214. 5 Johns. Rep. 246.

‡ 1 N. R. L. 78. (a) 5 East, 10. 3 Johns. Rep. 214. 8 Johns. Rep. 33.

§ 2 *Cuiner's* Rep. 344. 11 Johns. Rep. 180. 7 East's Rep. 339. 2 H. Bl. 609.

|| 4 Johns. Rep. 461.

facts in the case will, in the opinion of the Court, support the recovery, on the count for money had and received. The order drawn by the defendant upon *Eldred*, in favor of *Briggs*, the testator, was, as it imports upon the face of it, to be credited upon a bond and mortgage, given by *Eldred* to the defendant and *Jesse Potter*. This bond and mortgage was given to them, as the administrators of *John Potter*, deceased, for lands belonging to his estate, and sold under an order of the surrogate; and the order drawn by the defendant was in part payment of a debt due from *John Potter* to the testator, *William Briggs*. It is very evident, that this order never was paid by *Eldred*, nor credited upon the bond and mortgage, as was intended at the time it was drawn; and the defendant afterwards transferred this bond and mortgage to *Sampson* and *Warren*, and received the full amount thereof, without deducting the order; and in the account subsequently rendered to, and settled before, the surrogate, by the defendant, of his administration of *Potter's* estate, he received a credit for the debt due to *Briggs*, in part payment of which the order was drawn. These facts show conclusively, that the money has come into the defendant's hands, and will warrant the conclusion, that he received it to the use of *William Briggs*. The settlement of his account, and claiming a credit for the debt paid to *Briggs*, shows that the defendant considered the money appropriated to the use of *Briggs*, and not as money in his hands, for the benefit of the creditors of *Potter*, generally. The plaintiff is, therefore, entitled to recover, unless barred by \*the statute of limitations; and, in the opinion of the Court, the evidence is sufficient to take the case out of the statute. In the conversation stated to have taken place between the defendant and *Brown*, it was not intimated by the defendant that he intended to avail himself of the statute, but the only question in his mind seemed to be, whether the order had not been paid; and he promised to examine his papers, and if he found he had paid the order, he was to write to the witness; but, as the witness testified, he never has written. This was sufficient to raise an implied promise to pay the money, unless, on examination, it should be found that the order had been paid, and there is no evidence whatever of any payment. The motion for a new trial must, accordingly, be denied

NEW-YORK,  
Oct. 1816.

MOSHER.  
V.  
HUBBARD

[ \* 513 ]

Motion denied.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MOORE.

JACKSON, *ex dem.* COLDEN and others, against MOORE.

Where several persons, being possessed of an undivided tract of land, in 1765, made partition, and conveyed the entire tract to A., in trust, to convey to each of the grantors his proportion in severalty, and the land had been since generally held according to that partition, it was held, in an action of eject-

[ \* 514 ]  
ment brought in 1807, by a person claiming under one of the parties between whom partition was made, that a conveyance by the trustee, in pursuance of the trust, was to be presumed.

A. entered into possession of land, under a lease in fee, in 1775, and in 1778 gave the land to B., by parol, who continued in possession, claiming under the lease, until 1798, excepting the period of the war, and a year or two after, and B. conveyed the premises to C., and C. to D., who conveyed the same to the defendant; it was held, that this was sufficient adverse possession to bar an action of ejectment by the person having title to the land, commenced in 1807.

Where an adverse possession begins to run in the lifetime of the ancestor, and descends to an infant heir, the latter is not protected by his disability. (a)

THIS was an action of ejectment, brought to recover lands lying in the artillery patent, in the town of *Fort Ann*, in the county of *Washington*, and which was commenced in *August* vacation, in the year 1807. The case was tried before Mr. Justice *Van Ness*, at the *Washington* circuit, in *June*, 1810.

The lessors of the plaintiff claimed under letters patent to *Joseph Walton* and 23 others, dated the 24th of *October*, 1764, for a tract of land containing 24,000 acres, known by the name of the artillery patent. This tract was conveyed by deed, dated the 25th of *October*, 1765, by *Joseph Walton*, *Alexander Colden*, and the other proprietors, to *Abraham Walton*, by which it was recited, that the parties of the first part having, by sundry *mesne* conveyances, become seised of the whole tract, in the proportions therein stated, had agreed to divide the tract into 250 lots, and to release the whole to the party of the second part, his heirs and assigns, to stand seised of the several lots drawn to the \*share of each of the parties of the first part, for their respective uses, in fee, and designated the several lots which had been drawn to the share of each of the parties of the first part; and the party of the second part covenanted to execute releases in fee, to each of the parties of the first part, of their respective lots when required. *Abraham Walton* died several years before the commencement of this action, and the lessors of the plaintiff, excepting *Colden*, are his heirs at law. *Alexander Colden* died in 1775, leaving *Richard N. Colden* his heir, who died in 1777, leaving *Alexander R. Colden* his heir, who died in 1796, leaving *Cadwallader R. Colden*, one of the lessors of the plaintiff, his only brother and heir. *Alexander R. Colden* was about 22 years old when he died, and *Cadwallader R. Colden* was born in 1775 or 1776. It was admitted on the trial, that the patent was generally settled, and held under, and according to, the partition made by the proprietors.

It was proved by the defendant, that on the 27th of *May*, 1767, one *Jane Ragland* took possession of 100 acres of land, on the north part of lot No. 15, in the artillery patent, (in which the premises in question are included, and which, in the partition of the patent, had fallen to the share of *Alexander Colden*,) under a lease in fee from one *Anthony Farrington*, reserving a pepper-corn rent. *Jane Ragland* died in 1778, and previous to her death, gave the land she claimed, by parol, to her son, *James Perkins*, (she, however, having other children,) who went into possession, and continued in possession until

(a) *Jackson v. Burton*, 1 *Wendell's Rep.* 341. *Clapp v. Bromagham*, 9 *Conn. Rep.* 530. *Jackson v. Schaubee*, 7 *Ibid.* 187.

the war, when he joined the army of the *United States*, and one or two years after the war, resumed the possession for about 11 years. The original lease to *Jane Ragland* was burnt with *Perkins's* house, after the war. In 1787 or 1788, *Perkins's* possession was in part enclosed by fences, principally made by the owners of the adjoining lots upon their outer lines, and the residue by a fence of brush and lopped trees. *Perkins* had, at that time, about 30 acres improved, and had since extended his improvement to 30 or 40 acres. *Perkins*, by deed dated the 30th of *August*, 1798, conveyed the land which he claimed to one *Solomon Williams*, who took possession at the time of his purchase. *Williams*, by deed dated the 20th of *October*, 1803, conveyed 73 acres, 12 rods, and 75 poles, to *Roswell Comstock*, who, by deed dated the 1st of *August*, 1804, conveyed the same to the defendant. It was admitted, that *Perkins* was possessed of the \*premises, in the manner above stated, about 21 years previous to the commencement of this suit.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case containing the above facts.

*Van Vechten*, and *Mitchill*, for the plaintiff, contended, 1. That the plaintiff had showed a sufficient title; that if the statute executed the uses, then the lessors claimed under the heirs of *Colden*; if not, they derived title under *Walton*, to 8-24ths of the premises. But, in either case, they claimed to hold in severalty; and they relied on the case of *Doe, ex dem. Clinton, v. Phelps*,† and *Doe, ex dem. Clinton, v. Campbell*,‡ as in point to show that, after so great a lapse of time, a title in the whole in *Walton* and his heirs, and a conveyance by the trustee, was to be presumed; and that the lessors had, therefore, a perfect title to the whole, in severalty.

2. As to the adverse possession set up, the present case did not come within the principles of former adjudications.§

*Z. R. Shepherd*, contra, insisted, that the lessors of the plaintiff had not shown title. In the cases cited, the patentees were lessors of the plaintiff. But what title had *Alexander R. Colden*? The act of eight of the 24 patentees joining in a conveyance to a special trustee could not affect the rights of the other patentees. Again; the defendant has shown an adverse possession, uninterrupted, for more than 20 years.

*Per Curiam*. The premises in question are a part of lot No. 15, in the artillery patent; and the lessors of the plaintiff are *Cadwallader R. Colden*, and the heirs of *Abraham Walton*. The first question that arises is, whether any title has been shown in the lessors, or any of them. The patent was granted in the year 1764, to *Joseph Walton*, and twenty-three other persons, for twenty-four thousand acres of land. In the year 1765, a partition of the patent was made among the then proprie-

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MOORE

[ \* 515 ]

† 9 Johns. Rep.  
169.

‡ 10 Johns.  
Rep. 471. *Jackson v. Lown*, 3  
Johns. Cases,  
232.

§ 2 Johns. Rep.  
250. 9 Johns.  
Rep. 163. 171.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MOORE.

[\*516]

tors; and for the purpose of making the partition, a deed in trust was executed to *Abraham Walton*, who covenanted, on his part, to execute releases in fee, to the respective owners of the lots, according to such partition. This deed contained a recital, that the parties of the first part had, by sundry mesne conveyances, become seised of the lands granted by the patent, in the proportions therein mentioned, according to which lot No. 15, including the premises in question, fell to *Cadwallader Colden*, who was a party to the deed, and from whom *Cadwallader R. Colden* derives his title. Eight of the original patentees were parties to this deed; so that, as to eight twenty-fourth parts of the premises, the title was clearly conveyed to *Abraham Walton*. It was admitted upon the trial, that the patent was generally settled, and held under, and according to, this partition. These facts, after such a lapse of time, are sufficient to presume a title to the whole of the premises in the heirs of *Abraham Walton*, or that he had executed the trust, and conveyed in severalty, to the respective owners; and in either case, the title would be thus proved in some of the lessors. The principles laid down and adopted by this Court, in *Doe v. Phelps*, (9 Johns. 171.) and *Doe v. Campbell*, (10 Johns. 475.) are directly in point, and would fully warrant a judgment for the plaintiff, were it not for the adverse possession on the part of the defendant. The lessor, *Cadwallader R. Colden*, can claim no benefit from his infancy; for the statute, if it has run at all, began to run in the lifetime of the ancestor, and the facts disclosed upon the trial show a very strong case of adverse possession. As early as the year 1775, possession was taken of one hundred acres of lot No. 15, under a lease from *Anthony Farrington*. This lease was not produced upon the trial, but its loss and contents were sufficiently proved, and appeared to be a lease in fee, at a nominal rent. And although there was no legal transfer of the lease to *Perkins*, yet he, in the year 1778, took possession, claiming under it, and continued such possession, except while it was interrupted by the war, until the year 1798, when he sold and conveyed to *Solomon Williams*, who, in 1803, conveyed to *Comstock*; and in 1804, *Comstock* conveyed to the defendant. These facts show, very satisfactorily, such an adverse possession as will protect the defendant against the present action; and upon this ground alone judgment is given for the defendant.

Judgment for the defendant. (a)

(a) In the case of the same lessors against *John Parish*, the premises in question were a part of the land formerly held by *Perkins*; and judgment was also given for the defendant, on the ground of adverse possession. But the five other cases, at the suit of the same lessors, depending on the same case, judgment was given for the plaintiff, as no adverse possession was attempted to be set up.



\**MILLER against STARKS.*NEW-YORK,  
Oct. 1816.MILLER  
v.  
STARKS.IN ERROR, on *certiorari* to a justice's Court.

The defendant in error brought an action against the plaintiff in error in the Court below, which was commenced by warrant, the plaintiff below having first given the security required from non-residents. At the return of the warrant, the defendant below alleged that the plaintiff was not a non-resident, and not entitled to have a warrant; but no plea in abatement was regularly put in, and the plaintiff was sworn at the particular request of the defendant, as to his evidence, and the objection was there overruled. Issue was joined between the parties, the defendant giving notice of a set-off of a book account, and of a judgment recovered by him against the plaintiff, before another justice. The plaintiff having proved his demand, the defendant offered to set off the book account, to which the plaintiff objected, on the ground that the defendant had taken out an attachment under the twenty-five dollar act, and had taken his goods under it, which were then in possession of a constable, and that judgment had been given against the plaintiff below; and offered the testimony of the justice before whom it was obtained, which was objected to, but admitted. The defendant, however, afterwards, himself produced the proceedings and judgment, and offered the judgment as a set-off, but it was rejected by the justice, and a verdict and judgment were given for the defendant in error.

Where an attachment has been issued under the twenty-five dollar act, and judgment obtained thereon, and afterwards the defendant in that attachment brings an action against the plaintiff, the latter cannot set off such judgment, it being presumed to have been satisfied by the property taken under the attachment.

Where improper testimony is produced by one of the parties, and admitted, and afterwards legal testimony of the same fact is produced by the opposite party, the error is cured.

If one of the parties in a suit is sworn and examined, at the request of the other party, the latter cannot afterwards object to it.

*Per Curiam.* The only question worthy of notice in this case is, that which relates to the offer, on the part of the defendant, to set off the judgment which he had obtained against the plaintiff. This judgment would have been a good set-off, had not the plaintiff's goods and chattels been taken under the attachment, and were then remaining in the custody of the law, for the purpose of satisfying the judgment; and, if so, the judgment, so far as respects the liability of the plaintiff, was satisfied. The constable, upon the attachment, is required to take, and safely keep, the property, to satisfy the judgment; and to allow this judgment to be set off under such circumstances, would be making the plaintiff twice responsible for the same demand. The *\*set-off* was, therefore, properly rejected. The admission of parol proof of the proceedings on the attachment was improper; but this was cured by the subsequent introduction of the certified copy of the proceedings, by the defendant himself. The defendant cannot object to the plaintiff's having been sworn as a witness, as it was done at his particular request. The judgment must, accordingly, be affirmed.

[ \* 518 ]

Judgment affirmed.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
GOES.

pressed in the letters patent, that fact cannot be inquired into in a Court of law.

On the production of the letters patent, in this case, the plaintiff is entitled, *prima facie*, to recover. The *onus probandi* lies on the defendant to show the title to be in the person under whom he claims. It is no answer to the plaintiff's claim, that there is a person of the same name with the lessor, without showing a title to the premises in such person. Besides, how is it certain, that the person proved by the defendant is not, in truth, the lessor of the plaintiff?

For the defendant, it was argued, that, on the principles admitted in the case of *Jackson, ex dem. Houseman, v. Hart*, the correctness of which decision it was not intended to question, the defendant was entitled to judgment in his favor. The Court there said the patent was conclusive, that the patentee named was the person intended by the legislature; and that where a person of a different name claimed the land, parol evidence was not admissible to explain that intention. It was agreed, however, that if there were two persons of the same name, it would be a latent ambiguity, and parol evidence was admissible to explain which of the two was intended.

[ \* 521 ]

The lessor of the lessor, no doubt, on producing the patent, is, *prima facie*, entitled to recover; but the defendant having proved the existence of another person of the same name, the burden of proof, as to the identity of the patentee, is thereby thrown on the plaintiff; for the plaintiff in ejectment must, emphatically, recover on the strength of his own title.

By the act of the legislature, a certain district of country was set apart for the two regiments of this state, serving in the army of the *United States*, and no patents were to be issued to any other persons. This is a public act of which the Court are bound to take notice. The patent in question was granted for a lot of land in the tract described in the act; and the intention of the legislature is thus made manifest by the act. The act and the patent are to be taken together; and it clearly appears from them, not only that a person of the name of *Peter Shultze* was intended, but that he was a soldier; and if the defendant, on the trial, shows that the lessor of the plaintiff was not a soldier, the fact will be sufficient to prevail over the mere circumstance of a similarity of name.

PLATT, J., was of opinion that the plaintiff was not entitled to recover, and thought the case clearly distinguishable from that of *Jackson, ex dem. Houseman, v. Hart*, the principle of which decision he held to be sound law.

YATES, J., and VAN NESS, J., declared themselves to be of the same opinion.

SPENCER, J. The Court being unanimously of opinion that the defendant is entitled to judgment, but for different reasons

it is rendered necessary for me to state, very briefly, the grounds of my opinion.

It is a general and universal rule in this action, that the plaintiff is to recover on the strength of his own title, and unless the defendant is estopped from controverting the plaintiff's title, he may rest on his possession, and attack the title under which the plaintiff claims. The grant under which the lessor deduces \*his title was issued under the act to carry into effect the concurrent resolutions and acts of the legislature for granting certain lands, promised to be given as bounty lands; and by reference to those resolutions and acts, it will be seen, that the objects of that bounty were the officers and soldiers serving in the army of the *United States*, in the line of this state, to wit, *Lamb's* regiment of artillery and two regiments of infantry. The letters patent to *Peter Shultze* were, undoubtedly, intended to vest in him, as a soldier in one of those regiments, a title to the lot in question, as a bounty for his services in that capacity. It is perfectly clear, that the lessor of the plaintiff cannot be *the Peter Shultze* to whom the grant was made, because the lessor confessedly was not a soldier in the revolutionary war. It is equally certain, that *Peter Shultze*, who resided, seven years before the trial, at *Warren*, in *Herkimer* county, could not be entitled to military bounty for revolutionary services; for, according to the case, he was born about the year 1777, and the war terminated in 1783, at which time he was about six years of age. I am of opinion, that, independently of the existence of *Peter Shultze* of *Warren*, it would have been competent for the defendant to show that the lessor of the plaintiff, *Peter Shultze* of *Rhinebeck*, was not the patentee, and had no title, merely from the adventitious circumstance of a similarity of name with the patentee, to recover possession of the premises; this opinion, it appears to me, is warranted by the unanimous judgment of the Court, in *Jackson v. Stanley*, (10 *Johns. Rep.* 133.)

In the subsequent case of *Jackson v. Hart*, (12 *Johns. Rep.* 77.) though I took no part in that decision, having been unavoidably absent when it was argued, I understand from the opinion expressed, that it was not intended to shake, much less to overrule, the prior decision in *Jackson v. Stanley*. The identity of a grantor, in many cases, is a latent ambiguity. The deed is, on the face of it, free from ambiguity; the extrinsic or collateral matter out of the instrument, produces the ambiguity. The case, commonly put, is, where there are two persons of the same name, to both of whom the description in the deed is equally applicable, parol proof is then resorted to, to show to which of the two the deed was intended to be given. Lord *Cheney's* case (5 *Co. Rep.* 68. b.) is the earliest case on the subject, and has never been doubted. I cannot think it was necessary for the defendant to prove that there were two persons in existence, at the time of the trial, of the name of *Peter Shultze*, in \*order to be let in to show that the lessor of the plain-

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
GORS

NEW-YORK,  
Oct. 1816.

JACKSON  
V.  
GOZS.

tiff was not the patentee. There, undoubtedly, was such a man, who served in the army of the *United States*, in the line of this state; this is proved by the letters patent; then why was it not admissible to the defendant to show that *Peter Shultze* of *Rhinebeck* was a different man? It seems to me, that the proof that there was another *Peter Shultze* living at the time of the trial was making no progress in disaffirming the pretension set up by the plaintiff, that his lessor was the patentee, when it clearly appeared that this *Peter Shultze* could not possibly be the patentee; the only effect of this was to show, what required no proof, that there are many persons in the state of the same Christian and surname.

In this action, whenever the plaintiff introduces a deed conveying the premises to a person of the name of his lessor, it is *prima facie* evidence that the lessor is the real grantee; the burden of disproving this, and repelling the presumption, is thrown on the defendant, and he may prove that the deed was granted to a different person of the same name. If it be not so, then any man who can find a deed on record, to a person of the same name, may use it for very mischievous purposes. If the lessor of the plaintiff is not the patentee, then he has no title to the lot; and may not the defendant who is in possession, and can protect himself against every one but the true owner, show all the necessary facts to make out that the lessor has no title to the premises? Such proof does not vary or contradict the deed, but is perfectly consistent with it. It admits the grant to have been correct, but shows that the lessor is not what he assumes to be, the person to whom it was made, and that he has no right, not being the patentee, to turn the defendant out of possession.

Without being influenced at all by the evidence that there was another *Peter Shultze* in existence at the time of the trial, or a few years before, my opinion proceeds on the ground that the lessor of the plaintiff is proved not to be the patentee, and I hold that proof to have been correctly given.

THOMPSON, Ch. J. I concur in giving judgment for the defendant. I had come to a different conclusion, supposing that this case could not be distinguished from the case of *Jackson v. Hart*, (12 *Johns. Rep.* 77.) But as I dissented from the opinion of the Court in that case, and my brethren who were parties to it, thinking it is not in the way here, I feel no hesitation in saying the plaintiff is not entitled to recover. I put it on the \*ground, however, that neither *Peter Shultze*, the lessor of the plaintiff, nor the other *Peter Shultze* mentioned in the case, was the person intended as the patentee; it appearing, by the case, without entering particularly into the testimony, that the latter was not born at the commencement of the revolution, and the former not coming within the description of the persons mentioned in the act of the legislature, under which the patent was issued, and to which it refers. That the identity of the paten-

is a matter that may be inquired into in this collateral way, is settled by the case of *Jackson v. Stanley*, (10 Johns. Rep. 136.) and which case I understand it was not intended to overrule by the decision in *Jackson v. Hart*. An inquiry as to the identity of the patentee, does not, in any manner, contradict, or make void, the patent; nor does it imply that there is not a person *in esse* capable of taking under the grant. It only goes to show that the person claiming to be the patentee was not such person. If it should appear that he was the person intended, the inquiry must there stop. If the commissioners of the land-office had mistaken their powers, and made a grant to a person not coming within the description in the act, and the patent was sought to be vacated on that ground, there can be no doubt that it must be done by some direct judicial proceeding. But an inquiry into the identity of a patentee, would not come within the scope of a *scire facias*. This can only arise when some person comes forward to assert a right under the patent; it is then, and then only, that it can be objected to him, that he is not the patentee, although he may have the same name. It is altogether a mistake that such an inquiry is an attempt to vacate the patent. It leaves it in full force and effect, according to its original intention and operation. This is not a naked grant to *Peter Shultze*. The patent refers to the act under which it was issued, containing a description of the persons intended to be embraced within the bounty of the legislature. This may be considered as matter of description adopted by the patent, and which necessarily opens the door to let in the inquiry, whether the person claiming to be the patentee answers such description. The identity of the grantee, as well as of the thing granted, must, generally speaking, partake, more or less, of a latent ambiguity, explainable by testimony, *dehors* the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee. \*I can discover no sound reason for such restriction, and I am persuaded that the rule, thus understood, is too limited to meet all the cases that may arise, necessarily requiring its application. It is, therefore, upon the broad ground that it is always open to a defendant in ejectment to show that the lessor of the plaintiff is not the person intended by the patent under which he sets up his claim, although he may bear the same name, that I concur in the judgment for the defendant.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
GOES.

[ \* 525 ]

Judgment for the defendant.

NEW-YORK,  
Oct. 1816.

JACKSON

V.  
VAN BUREN.

JACKSON, *ex dem.* VALKENBURGH, against VAN BUREN

One hundred acres of land, in a certain patent, were devised to *M.*, where she pleased to take the same, and to her heirs and assigns forever. It was held that no title to any particular part of the patent vested in *M.*, and she not having made any election in her lifetime, the right of election was gone, and could not be exercised by her heirs, especially after a lapse of 40 years from the death of the devisee.

THIS was an action of ejectment, tried before Mr. Justice *Van Ness*, at the *Columbia* circuit, in *January*, 1815.

The lessor of the plaintiff is the son and heir of *Maryche*, (*Maria*), a daughter of *Peter Martin Van Buren*, who was married to *Jerome Van Valkenburgh*. She died before the revolutionary war, and her husband after the war. *Peter*, the lessor's elder brother, died before the war, without issue.

It was admitted that *Peter Martin Van Buren* was seised, in 1720, of an undivided ninth part of *De Bruyn's* patent, in the town of *Kinderhook*. He left six children, to wit; *Cornelius*, *Barent*, *Tobias*, *Martin*, *Eytie*, and *Maria*, or *Maryche*.

Evidence having been given of the existence and loss of the original will of *Peter Martin Van Buren*, made in 1722, a copy thereof was read in evidence, and which contained the following clauses: "I give to my daughter *Eytie Vosburgh*, wife of *Martin Vosburgh*, the house in which she now lives, with five *morgan* of land with it; and twenty-five *morgan* of woodland, and twenty-five *morgan* of pine wood, where she pleases to take the same, out of the right of *De Bruyn's* patent, which I have acquired by deed from *Johannes Van Alen*, for her, her heirs and assigns, forever." "Also, I will that my youngest daughter, *Maryche Van Buren*, shall have a decent outset, so as her sister *Eytie* has had, &c., and twenty-five *morgan* of woodland, and twenty-five *morgan* of pine wood, out of the right of *De Bruyn's* patent aforesaid, to her, and her heirs and assigns, forever." The testator gave to his four sons equal shares of *De Bruyn's* patent, except what he had before devised.

[ \* 526 ]

The plaintiff read in evidence an act passed the 4th of *February*, \*1794, confirming a division and exchange of a certain tract of land in *Kinderhook* granted to *John Hendricks De Bruyn*. The partition was made in 1793, by which lot No. 1, of the third allotment, and lot No. 2, of the first allotment, fell to the share of *Peter Martin Van Buren*. The plaintiff also gave in evidence articles of agreement made in 1792, to which the defendant was a party, confirming the exchange, and authorizing the partition referred to in the above-mentioned act.

A written notice, dated the 1st of *August*, 1813, signed by the lessor, was served on the defendant, which, referring to the will of *P. M. Van Buren*, and the devise to his daughter *Maria*, stated that he, the lessor, as heir at law of the said *Maria*, gave notice that for the remainder of the land, which was still due under the said devise, he had located upon, and chosen lot number one, of the third allotment, and fifteen acres of the eastern part of that portion of lot No. 2, of the first allotment of *John E. Van Alen's* division of the said patent, &c., as is now in his, the defendant's possession; which said lots No. 1 and No

2, upon the division aforesaid, were allotted to the heirs and representatives of *P. M. Van Buren*.

The defendant was in possession of about half of lot No. 1, and of the eastern part of lot No. 2, on which the defendant's house stands.

*C. Van Alen*, a witness for the defendant, testified that No. 7, of the 7th allotment of *De Bruyn's* patent, fell to the share of *Peter Martin Van Buren*, containing 290 acres. That the lessor of the plaintiff, in 1794, after *John E. Van Alen's* survey, made a location on 51 acres lying west of the *Albany* road, as heir of his mother, according to the will of *P. M. Van Buren*, by cutting a possession fence around it, and declaring that he took it under the will; and the witness purchased 25½ acres of this lot of the lessor, which he held under that title; and the residue was held by other purchasers, from the heirs of *P. M. Van Buren*. The witness had contracted to purchase of the lessor the whole of the 51 acres, but got a deed for one half only; the other half being in possession of persons claiming under the heirs of *P. M. Van Buren*, who refused to let him have it. This was considered pine land. The lessor got his oak land in another part of the patent. The witness advised the lessor, as his location was resisted by the possessors, to give it up. The lessor, accordingly, gave it up, and said he would locate elsewhere, on a lot lying east of the post road. The land in the \*possession of the defendant was considered by some of the witnesses as oak land, and by others consisting of oak and pine land.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the Court on a case agreed upon containing the facts above stated.

*Van Vechten*, for the plaintiff, contended that the right of election given to *Maria Van Buren*, descended to her heirs, and might, therefore, be exercised by the lessor of the plaintiff.†

*Van Buren*, (attorney-general,) contra, insisted that the right of election must be exercised in the lifetime of the devisee or grantee, and was not descendible.‡ That it would be against justice and good policy to allow it to be exercised after a lapse of near a century from the death of the testator. He relied on the case of *Vandenbergh v. Van Bergen*,§ as in point.

*Van Vechten*, in reply, said, that the devise ought to be carried into effect, so far as it could be done consistently with the rules of law. The testator clearly showed his intention that the interest devised should vest; and, if so, it was a descendible interest. The devise was to *M.*, and her heirs and assigns. There was no limitation as to the person who was to make it; and the cases cited to show that the right of election must be exercised in the lifetime of the person to whom it was given, were not applicable. Besides, it was in the power of the ad-

NEW-YORK,  
Oct. 1816.

JACKSON  
V.  
VAN BUREN

[ \* 527 ]

† 9 *Vin. Abr.*  
359. 361, 362,  
363. *Election*,  
(B.) (C.) (D.)  
260. 36. b. 37.  
a. *Moore*, 691.  
*Cro. Eliz.* 819.  
2 *Bulst.* 7.  
‡ 2 *Co.* 37.  
*Dyer*, 287. *Anders.* 11. *Hob.*  
174.

§ *Ante*, p. 212.

NEW-YORK, verse party to quicken the exercise of the right of election, as soon as the lessor was in a situation to make it.

JACKSON  
V.  
VAN BUREN.

[ \* 528 ]

YATES, J., delivered the opinion of the Court. The devise to *Maryche* was intended, by the testator, to be the same (as to the right of election) with the one to his daughter *Eytie*, and must be governed by the same legal principles. She had a right, then, to locate the twenty-five *morgan* of pine wood land where she pleased; and, until the location had been made by her, the lands thus devised in severalty could not be distinguished, or taken from the residue, owned by the testator in *De Bruyn's* patent; and it remained wholly uncertain to what part of them she would have this right in severalty, or to which part such right would attach, until the act was consummated by her; for this reason, no estate, or interest, in any particular part of those lands could pass to her, presently, by the devise, but depended upon the previous act of election to be made by her; and she not having thought proper to make it in her lifetime, it is important to examine whether the right can be extended to her heirs.

In 2 *Coke's Rep.* 36, 37. (*Heyward's Case*.) it is stated, that when nothing passes to the feoffee, or grantee, before the election to have one thing or the other, then the election ought to be made in the lifetime of the parties, and the heir, or executor, cannot make the election; and *Bullock's Case* of 10 *Eliz.* 231. is there cited from *Moore*, 81., in which it is stated, that if the heir of the feoffee should make the election, he would be in as a purchaser; for nothing passes to the feoffee before election; and by the law, he cannot be a purchaser, for then the words (his heirs) were words of limitation.

The case of *Vanderbergh v. Van Bergen* (*ante*, 212.) is, in some measure, applicable to this. There the defendant, under a deed for certain lands in *Corsackie* patent, with full liberty and license to erect and build a mill on any place at or on the *Corsackie* creek, with liberty of ground and stream of water, claimed the right of overflowing the plaintiff's land; which was held by the grantor, at the date of the defendant's deed; this Court decided, that though the grantee, in his lifetime, would have had a right to erect a mill on the creek, and to have overflowed, so far as was reasonable and necessary, the land of the plaintiff, adjacent to the creek, which land had been purchased from the defendant's grantor, subsequent to the date of his deed, yet, not having elected to erect the mill in his lifetime, the right became extinct at his death. So here the right was potential, and rested entirely upon the location and election to be made by the devisee. She was not vested in her lifetime with the title to any particular parcel. By virtue of the will, her election and location were necessary to consummate the title, and, she never having designated the land, the exercise of the right, by the heir, is gone, particularly as the claim is interposed upwards of



forty years after the death of the ancestor. But this need not be urged in the decision of the present cause; for, admitting that the right to elect was not confined to the ancestor, and that it descended to the heir, there can be no doubt but that, in this instance, the heir has, by a previous election \*of other lands, extinguished all possible claim to the premises in question.

It appears, by the case, that in 1794, the year after *John E. Van Alen's* survey, the lessor of the plaintiff elected to locate 51 acres, or 24 morgan, at another place, as heir of the devisee, according to the will; that he made an entry on the land, and cut a possession fence around it, and actually sold 25 1-2 acres parcel of it, which is now held under that title; but to avoid a lawsuit with persons claiming under other devisees, he thought proper to abandon his claim to the residue. If he had any right to make his election, it is extinguished by that location as to any other lands owned by the testator. No acts could be more prominent; he openly avowed his intention, took possession, and sold part of the land. He was, consequently, obliged, thereafter, to confine his claim, under the devise to his mother, to those lands, and cannot now resort to other property in the patent belonging to the testator; it would be extending an unreasonable latitude to the exercise of a right of this description; and, in its consequences, would be attended with fraud and injustice to *bona fide* purchasers. The election thus made by the heir, therefore, independent of the reasons before assigned, is sufficient to entitle the defendant to judgment.

Judgment for the defendant.

### HINMAN against BREES, sheriff, &c.

THIS was an action of *debt* for an *escape*, brought against the defendant, sheriff of *Rensselaer* county. The cause was tried before Mr. Justice *Spencer*, at the *Rensselaer* circuit, in June last. It was admitted that the plaintiff had obtained a regular judgment against *William Le Barrow*, in the Court of Common Pleas of *Rensselaer*, in August, 1815, for 216 dollars \*35 cents; and the defendant was called upon, at the trial, to

NEW-YORK,  
Oct. 1816.

HINMAN  
v.  
BREES.

[ \* 529 ]

In an action of *debt* against a sheriff for the *escape* of a prisoner in execution on a *ca. sa.*, *parol* evidence is admissible to show the issuing of the execution [ \* 530 ]

its delivery to the sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa.*, and having refused to produce it at the trial, though due notice, for that purpose, had been given to him before trial.

It is the duty of the sheriff to return a writ without a rule of Court for that purpose; and he cannot avail himself of his neglect of duty, to defeat the plaintiff's action. (a)

Where, on a judgment in a bailable action, a *ca. sa.* is issued without a *fl. fa.* having been previously issued, and returned *nulla bona*, pursuant to the statute, the sheriff, in an action against him for an escape, cannot avail himself of the irregularity; but application must be made to the Court, to set aside the *ca. sa.*, on the ground of such irregularity. (b)

(a) Vide *Wilson v. Gale*, 4 *Wendell's Rep.* 623. *Dyert* ad. *Crawe*, 1 *Ibid.* 534. *Gorham v. Gale*, 7 *Conn. Rep.* 739. *Armstrong v. Garroo*, 6 *Ibid.* 465.

(b) *Scott v. Shaw*, *supra*, 378. *James v. Cook*, 1 *Coven.* 309. acc. Vide *Unitt & Stiles v. Jenkins*, 18 *Johns. Rep.* 395.

NEW-YORK,  
Oct. 1816.

HINMAN  
v.  
BREES.

produce the *ca. sa.* issued on the judgment, which was stated not to have been returned by the defendant, but was still in his possession, due notice having been given to the defendant to produce the writ. The defendant's counsel refusing to produce the *ca. sa.*, the plaintiff offered parol evidence to prove the issuing of the writ, and the arrest of *Le Barrow* thereon; the evidence was objected to, on the ground that the *ca. sa.* was matter of record, and the return of it might have been enforced by a rule of Court. The judge overruled the objection; and a witness for the plaintiff testified that, on the day preceding the trial, the defendant's counsel showed him the *ca. sa.*, which was endorsed as having been received by the defendant the 3d of *November*, 1815; and that one of the deputies of the defendant told the witness, the next day, that the plaintiff delivered the *ca. sa.* to him, on the 3d of *November*, 1815, to be executed; and that, on the same day, he, the deputy sheriff, arrested *Le Barrow*, by virtue of the writ, but who, afterwards, on the evening of that day, made his escape. The writ was dated the 2d of *September*, and returnable the last *Monday* of *November*, 1815.

The defendant then offered to prove that the action on which the judgment was obtained against *Le Barrow* was a bailable action, and that special bail was, in fact, put in; and no exception made to its sufficiency; that the plaintiff, before issuing the *ca. sa.*, had sued out and delivered to the defendant a *fi. fa.*, on the same judgment, dated the 2d of *September*, and returnable the last *Monday* of *November*, 1815, and which was not returned "*nulla bona*" by the defendant, and filed in the clerk's office, until the last *Monday* of *November*, 1815; and that no other *fi. fa.* was ever issued on that judgment, but both of the said writs were in the possession of the defendant at the same time. This evidence was objected to by the plaintiff's counsel, and overruled by the judge, and the jury, under his direction, found a verdict for the plaintiff.

A motion was made for a new trial, on the part of the defendant, which was submitted to the Court without argument, on a case as above stated.

*Per Curiam.* This is an action of debt against the defendant, for the escape of a prisoner in his custody, on a *ca. sa.*; and \*the questions which are presented by the case relate to the sufficiency of the proof of the execution, and whether it was regularly issued or not. Notice to produce the execution on the trial had been duly given, but it was not produced; and whether secondary evidence of the existence of the execution was admissible, was one question agitated upon the trial. It was stated by the defendant's counsel, that the execution had not been returned, but was still in the defendant's possession. But parol proof of it was objected to, because the sheriff should have been ruled to return it, and the execution itself, or an ex-

emphlication of it, produced. The objection was properly overruled, and the parol proof established the issuing of the execution and its contents. There is no doubt but the sheriff might have been ruled to return the execution. It was his duty to have done this without being ruled, and he ought not to be permitted to avail himself of his own neglect of duty, to defeat the plaintiff's action, on a mere technical objection.

The irregularity complained of is, that the *cá. sa.* was issued before any *fi. fa.* had been returned *nulla bona*, according to the statute, special bail having been required in the original action. Admitting the irregularity, it was an objection which the sheriff could not avail himself of in this collateral way; but application should have been made to the Court to set aside the execution.

The motion for a new trial must, accordingly, be denied.

New trial refused.

### JACKSON, *ex dem.* PETER HARDER and others, against MOYER.

THIS was an action of ejectment, tried at the *Montgomery* circuit, *August* 29th, 1815, before Mr. Justice *Yates*.

The premises in question were 16 or 20 acres of land, and a dwelling-house thereon, in *Minden*. The lessors of the plaintiff are six of the heirs at law of *John Henry Moyer*, deceased, \*and the defendant, *John Henry Moyer*, is the other heir. *John Henry Moyer* died, seised of the premises, in 1810, having previously made his will, dated the 28th of *August*, 1810, by which he devised as follows: "I give and bequeath unto my son, *John Henry*, my farm, on which I now live; and being in the town of *Minden*, &c., containing 209 acres of land, be the same more or less, adjoining lands of *Henry Moyer*, *Johannes Miller*, and others, granted to me by several persons, and several lots, together with all the buildings and improvements thereon, to have and to hold the same to him, to his heirs and assigns forever."

After the death of the testator, the defendant let the premises in question on shares. The premises are separated from the farm by two lots belonging to other persons, except in one part, where it is separated by a small lot belonging to *Jacob Kellar*; and at this place, being the nearest to the farm, the distance from it is half a mile. The testator did not work the premises, as his homestead. The dwelling-house was built by the defendant, who had the control of the old farm, and the premises, for several years previous to his father's death.

*Henry Kellar*, a witness, testified, that the testator had not used the premises in question, as part of his farm, but that they

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
MOYER.

*M.* devised as follows: "I give and bequeath to my son, *John Henry*, my farm on which I now

[ \* 532 ]

live, &c., granted to me by several persons, and several lots," &c. *Held*, that a lot of about 16 acres, with a dwelling-house thereon, not adjoining the farm, and which had been let out for many years, as a separate and distinct lot, did not pass by the devise to *J. H.*

NEW-YORK, had been let out for about *forty* years, and did not, in any part,  
Oct. 1816. adjoin the farm.

JACKSON  
V.  
MOYER.

A verdict was taken for the plaintiff, subject to the opinion of the Court, on a case containing the facts above stated.

*Ford*, for the plaintiff, contended, that the premises in question formed no part of the testator's farm, but were a separate and distinct part of his estate, and he relied on the case of *Jackson, ex dem. Van Vechten, v. Sill*,† as in point to show that they did not pass by the devise to the defendant.

† 11 Johns.  
Rep. 261.

*Campbell*, contra, insisted, that as the testator had described his farm as consisting of several and distinct parcels, the words of the devise were large enough to include the premises in question; and that the evidence showed that they were under the control and direction of the defendant, in the lifetime of his father, in the same manner as the homestead, and were, therefore, to be deemed parcel of the farm.

[ \* 533 ]

\**Per Curiam*. The lessors of the plaintiff are six of the heirs at law of *John Henry Moyer*, deceased, and the defendant is the only remaining heir. It is admitted that *John Henry Moyer* died seised of the premises in question. The lessors claim, as his heirs at law, six sevenths of the premises in question, and the defendant claims the whole, under the will of *John Henry Moyer*; and the only question is, whether the devise to the defendant extends to the premises. The words of the devise are, "I give and bequeath unto my son, *John Henry*, my farm, whereon I now live," &c. The premises, as appears by the testimony, are about 15 or 20 acres of land, with a dwelling-house thereon, separate, and apart from the farm of the testator which he occupied, and not used by him as a part of the farm, but had, for 40 years, been let out as a separate and distinct lot. Under these circumstances the premises could in no sense be considered a part of the farm whereon the testator lived, and, of course, not embraced by the devise. This is a case very analogous to that of *Jackson v. Sill*, (11 Johns. Rep. 201.) and the principles then settled must govern the present decision. The plaintiff must have judgment for six sevenths of the premises.

Judgment accordingly.

JACKSON, *ex dem.* SPENCER, against R. BENEDICT.NEW-YORK,  
Oct. 1816.JACKSON  
v.  
BENEDICT

THIS was an action of ejectment for lot No. 7, in *Fabius*, set down to be tried at the *Onondaga* circuit, in *June*, 1816, and the facts being agreed to by the parties, the following case was submitted to the Court.

*Ebenezer Bebee*, on the 9th of *July*, 1814, recovered judgment in this Court, against *Gilbert Benedict*, to whom the premises in question belonged; and who, on the 22d *July*, 1814, was imprisoned on a *ca. sa.* issued on that judgment, returnable \*in *August* term, 1814. During the time he was so imprisoned, *Samuel S. Baldwin* recovered a judgment against him, in the *Onondaga* common pleas, on the 18th of *October*, 1814, on which judgment *Baldwin* issued a *fi. fa.*, by virtue of which the premises in question were sold, and conveyed by the sheriff to *Isaac Howell*, under whom the defendant claimed. The deed of the sheriff was dated the 13th *March*, 1815. On the 29th of *May*, 1815, *Gilbert Benedict* was discharged from his imprisonment on the suit of *Bebee*, by the Court of Common Pleas of *Onondaga* county, pursuant to an act entitled "an act for the relief of debtors with respect to the imprisonment of their persons," passed the 9th of *April*, 1813. (a) *Bebee* then issued a *fi. fa.* on his ejectment, tested the 13th of *May*, returnable in *August*, 1815, against the property of *Benedict*; and the premises in question were levied on and sold by the sheriff, by virtue of the *fi. fa.*, to the lessor of the plaintiff, and a deed to him was executed by the sheriff on the 7th of *September*, 1815.

The only question was, whether the sale of the premises in question, under the judgment in favor of *Baldwin*, was good as against the lessor of the plaintiff; and it was agreed, that if the Court should be of opinion that it was good, a judgment of non-suit should be entered, otherwise, a judgment was to be given for the plaintiff.

The cause was submitted to the Court without argument.

*Per Curiam.* Both parties claim title to the premises in question, under judgments against *Gilbert Benedict*, in whom the title is admitted to have been duly vested. The judgment under which the lessor of the plaintiff claims was first docketed; and admitting that, in ordinary cases between judgment creditors, this would give it priority, yet, under the circumstances of this case, it must be postponed, and preference given to the second judgment. On the first judgment, which was obtained in this Court, a *ca. sa.* was issued, and the defendant, *Gilbert*

Pending the imprisonment of a debtor, on a *ca. sa.*, another creditor obtained a judgment against him, on which a *fi. fa.* was issued, and the real estate of the debtor levied on and sold by the sheriff. The debtor having been afterwards discharged from imprisonment, under the act for the relief of debtors, with respect to the imprisonment of their persons, (1 N. R. L. 348.) a *fi. fa.* was issued on the first judgment, according to the provisions of the act. It was held that the lien of the first judgment was suspended during the imprisonment of the debtor, on the *ca. sa.*, and that the new execution could have no priority to any lien created, or right acquired by others, during the imprisonment; and the sale under the second judgment was, therefore, good.

(a) By the third section of this act, (1 N. R. L. 349.) † it is declared, "that, notwithstanding such discharge, every debt and demand, judgment and decree, against the person so discharged, shall remain good against the estate, real and personal, of such person," &c., "and any creditor, &c., may, at any time after such discharge, sue out a new execution, &c., for this said debt, &c., against the estate, &c., in the same manner and form as if such person had never been confined for the same."

† 2 R. S. 30.

NEW-YORK,  
Oct. 1816.

JACKSON  
v.  
BENEDICT.

[ \* 535 ]

*Benedict*, was arrested and imprisoned thereon. Whilst he was so imprisoned, a *fi. fa.* was issued on the second judgment, which \*was obtained in the *Onondaga* common pleas; and the premises in question levied upon and sold, and a deed given by the sheriff to *Isaac Howell*, under whom the defendant claims. *Gilbert Benedict*, having been discharged from imprisonment, under the act relative to the imprisonment of the person, a *fi. fa.* was taken out on the first judgment, and the premises again sold by the sheriff, and purchased by the lessor of the plaintiff. From these facts, it appears that the plaintiff, in whose favor the first judgment was obtained, had made his election as to his execution; and having taken the body of the defendant, he could not afterwards have recourse to his property, except in the special cases provided for by the statute, as where the defendant dies in prison, or where he is discharged under the statute as was the case here. But these are contingencies which may never occur, and it would be extremely unjust to continue the *lien* on the property after the body has been taken in execution. It would, in effect, be giving to a *ca. sa.* an operation upon the land, as well as the body of the defendant. Taking the body in execution is a discharge of the judgment except where otherwise provided by statute, and the imprisonment of the person must be a suspension of the *lien*. The defendant in such case would have a right to sell his property, either real or personal; and the execution, allowed by the statute to be taken out, after the discharge, against his property, cannot claim priority to any *lien* created, or right acquired, by others, during the imprisonment of the defendant. Judgment of nonsuit must, accordingly, be entered, pursuant to the stipulation in the case.

Judgment of nonsuit.

440

END OF OCTOBER TERM.

# CASES

ARGUED AND DETERMINED

IN THE

## Court for the Correction of Errors.

IN FEBRUARY, MARCH, AND APRIL, 1816.

JACKSON, *ex dem*: BROCKHOLST LIVINGSTON, and others,  
*plaintiff in error,*  
*against*

ANN DELANCY and ABRAHAM RUSSELL, *defendants in error.*

THIS cause came before this Court on a writ of error to the Supreme Court. [See the case reported 11 Johns. Rep. 365. 376.]

*A.*, in 1770, being indebted to *B.* by three several bonds, in order to secure the payment of the same, executed to *B.* a mortgage on all his lands, in the province of *New-York*, part of which lands were referred to by name, and part, comprising the premises in question, passing under a general clause, and covenanted, that, on default, the mortgagee, his heirs, &c., might enter. *B.* died, having directed by her will all her estate in certain patents, and elsewhere, wheresoever, and whatsoever, to be turned into money by her executors, and to be equally divided among her five children, who were to be tenants in common in fee of the realty, until such sale and distribution. In 1771, before the death of *B.*, the mortgage had become forfeited, and a judgment had also been recovered by *B.* against *A.* *A.*, by his will, executed in 1780, devised his estate to his wife, and, in case of her death without disposing of the same by grant or devise, he devised it over to his daughter *D.* In 1788, the judgment against *A.* was revived by the executors of *B.*, and a *scire facias* was directed to the heirs of *A.*, who were summoned, but not to the wife of *A.*, the tenant for life, who was not summoned, and execution was issued thereon, and the lands of *A.* sold, and purchased by *C.*, who had married one of the daughters and devisees of *B.*, and conveyed to him, who took possession of the premises in question, under that deed; which, however, it was now admitted, did not pass the premises. *C.* procured conveyances from three of the other devisees of *A.*, and the tenants of the land in 1790 attorned to *C.*, and surrendered their possession to him, and agreed to hold under him. The wife of *A.*, having died, after devising her estate to trustees in trust for her daughter *D.*, it was held, in an action of ejectment on the demise of *D.*, and her trustees, against persons claiming under *C.*, that *C.* had a right of entry under the will of *B.*, as devisee of the mortgage, which passed by the general words of the will, such appearing to be the intention of the testatrix, and that the defendants could set it up as an outstanding title to defeat the plaintiff's action.

A *scire facias*, to revive a judgment, irregularly issued, or an execution issued after a year and a day, without *scire facias*, is voidable only, and cannot be called in question, in a collateral action, so as to defeat the title of a purchaser under the execution; and it seems, that, after the lapse of twenty years, it cannot be avoided on a direct application for that purpose. (a)

In a sheriff's deed, nothing will pass under a general clause of "all other the lands, &c., of the defendant." In a sheriff's deed, the land sold must be described with reasonable certainty, and he can sell nothing under an execution which the creditor cannot enable him so to describe. (b)

In a devise of all the real and personal estate of the testator, and if the devisee should die without disposing of it, then to *D.*, this subsequent limitation is void; because the first devisee took a fee by virtue of the word estate, and because the subsequent limitation was repugnant to the power given to the first devisee. (c)

Where a person enters upon land without title, and the tenants surrender their possessions, and attorn to him, this is not a disseisin or ouster, and the attornment is void. Such entry and attornment are not the commencement of an adverse possession. (d)

Trust estates, under which is included the interest of a mortgagee, who, until foreclosure, is a trustee for the mortgagor, will pass under general words in the will relating to the realty, unless it can be collected from the expressions in the will, or the purposes and objects of the testator, that his intention was otherwise.

The 14th section of the act concerning costs (1 N. R. L. 346.) giving double costs on the affirmance of a judgment on error, applies only where the writ of error is brought by the defendant in the Court below. If the plaintiff below brings a writ of error, and the judgment is affirmed, he is entitled to single costs only.

(a) *Acc. Jackson v. Robins*, 16 Johns. Rep. 557.; but see *Woodcock v. Bennett*, 1 Cowen, 711.

(b) *Supra*, 97.

(c) *Jackson v. Robins*, 16 Johns. Rep. 169. S. C. 16 Id. 557.

(d) *Vide Jackson v. Brink*, 5 Cow. Rep. 483. *Jackson v. Brush*, 20 Johns. Rep. b. *Jones v. Clara* Id. 51. *Jackson v. Davis*, 5 Cowen, 123. *Clapp v. Bromagham*, 9 Id. 530.

## IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DE LANCY.

\*The action was for the recovery of certain lands in *Plattekill*, in the county of *Ulster*. The following facts were found by the special verdict. *William Alexander*, commonly called *Lord Stirling*, in his lifetime, was seised of a tract of land, supposed to contain 1,000 acres, situate in *Plattekill*, of which the premises in question are a part; and, being so seised, he executed to *Ann Waddell*, of the city of *New-York*, a mortgage, dated the 2d of *December*, 1770, reciting several debts due to her, &c., amounting to 5,043l. 16s., for securing which he mortgaged certain lands in *Orange county*, *West Chester county*, and in the counties of *Albany* and *Ulster*, "and all other the lands, tenements, and hereditaments, belonging to the said *William*, Earl of *Stirling*, within the province of *New-York*." The tract of 1,000 acres, including the premises in question, was not one of the parcels particularly described, but passed under the general description above mentioned, of all the other lands, &c. *Ann Waddell*, in *January* term, 1771, obtained a judgment in the Supreme Court on two of the bonds recited in the mortgage, which was signed and docketed the 21st of *March*, 1771. *Ann Waddell* died some time in the year 1773; having made her will, dated the 29th of *March*, 1773, in which she directs her executors, among other things, to collect "all outstanding debts of every kind, and these, with all the rest of her estate in the *Hardenburgh* patent, and elsewhere, whatsoever and where-soever, to be turned into money, and equally distributed among her five children, share and share alike, who were to be tenants in common, in fee of the realty, until such sale and distribution be made." In *April*, 1775, the executors of *Ann Waddell* revived the judgment by *scire facias*, in the Supreme Court, against *Lord Stirling*. And after the death of *Lord Stirling*, in the *October* vacation, in the year 1787, the executors of *Ann Waddell* sued out a *scire facias* on the judgment against the heirs and terre-tenants of *Lord Stirling*, on which *Robert Watts*, and *Mary*, his wife, and *Catharine Duer*, the heirs of *Lord Stirling*, were summoned; and in *January* term, 1788, judgment passed against them on the *scire facias*, by default. This writ of *scire facias* was directed to the sheriff of the city and county of *New-York*, and commanded him "to give notice to the heirs of the said *William*, Earl of *Stirling*, and, also, to tenants of all the lands and tenements in his bailiwick, which were of the said *William*, Earl of *Stirling*, on the 26th of *June*, 1771;" and the sheriff \*returned that he had "made known unto *Robert Watts*, and *Mary*, his wife, and *Catharine Duer*, which said *Mary* and *Catharine* are daughters and heiresses of the said *William*, Earl of *Stirling*, deceased, that they should be," &c.; and, further, "that there were no other heir or heirs of the said *William*, Earl of *Stirling*; nor were there any other tenants, or tenant, of any lands or tenement which were of the said *William*, Earl of *Stirling*, on the day the said judgment was rendered, or ever after, in his bailiwick," &c.

[\* 539.]



A *testatum fieri facias* was issued on the judgment so revived, directed to the sheriff of the county of *Ulster*, returnable in *July* term, 1788. On the 10th of *June*, 1788, the sheriff of *Ulster* executed a deed of conveyance to *John Taylor*, of the city of *New-York*, merchant, which recited that he, the sheriff, &c., had seized of the lands and tenements which were of the said *William*, Earl of *Stirling*, &c., in the hands of *Robert Watts*, and *Mary*, his wife, and *Catharine Duer*, as heirs, &c., within his bailiwick, the several tracts, pieces or parcels of lands, &c., thereafter mentioned and described, and the same lands and tenements, &c., he did separately expose to sale, and did sell and dispose of the same, to wit, the first of the said tracts, &c., for 50*l.*, and the second of the said tracts, &c., for the sum of 50*l.*, to *John Taylor*, being the highest bidder, &c.; these two tracts were particularly described in the deed, which, among the property so conveyed, further stated, "and, also, other the lands, tenements, and hereditaments, whereof the said *William*, Earl of *Stirling*, was seised, on the said 26th of *June*, 1771, or at any time afterwards, within the county of *Ulster*, whether held in severalty, or in common with others;" and under this general description was included the tract of 1,000 acres, containing the premises in question, and which were not otherwise or particularly mentioned and described. Lord *Stirling* died in the spring of 1793, leaving two daughters, *Catharine*, the wife of *William Duer*, and *Mary*, the wife of *Robert Watts*, his heirs at law, having, on the 29th of *January*, 1780, made his will, by which he devised "all his real and personal estate, whatsoever, to his wife, *Sarah*, to hold the same to her, her executors, administrators, and assigns; but, in case of her death, without giving, devising, and bequeathing, by will or otherwise, or assigning the said estate, or any part thereof, then he devised all such estate, or such parts thereof as should \*remain unsold; undevised, &c., unto his daughter *Catharine*, to hold the same to her, her executors, &c.; and appointed his wife, and his daughter *Catharine*, and her husband, *William Duer*, executors of his said will. *Sarah*, the wife of Lord *Stirling*, died in *March*, 1805; having, on the 27th of *November*, 1804, made her will, by which, after several pecuniary legacies, she devised "all the residue of her estate whatsoever, real and personal, in possession, or action, to *Brockholst Livingston*, and *Matthew Clarkson*, and the survivor, in trust, for the separate use of her daughter *Catharine*, then the wife of *William Neilson*, during her life, and after her decease, to be divided among her children; and appointed the persons so named as trustees, her executors. At the time of the death of Lord *Stirling*, the tract of 1,000 acres, of which the premises in question were part, was possessed by *Nathan Miller*; and persons holding under him, and was so held and possessed until the entry of *John Taylor*, and the attainment to him by *Miller* and the persons holding under him. *Miller* held the possession, as tenant to Lord *Stirling* and his representa-

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DE LANOT.

[\* 540]

## IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DR LANCY.

tives. *Ann Waddell* left five children, to wit, *William*, who resided in *England*, her eldest son and heir at law, *Henry*, *Mary*, the wife of the said *John Taylor*, *Ann*, the wife of *Eleazer Miller*, and *Sarah*, the wife of *Joseph Taylor*. On the 2d of February, 1788, *Henry Waddell* executed a conveyance, reciting the mortgage and judgment aforesaid of all his right, title, and interest in the same, to *John Taylor*; and a similar conveyance was executed the 19th of December, 1809, by *Eleazer Miller*, and *Ann*, his wife, of all their right, &c., to the said *John Taylor*; and on the 25th of December, 1809, *Joseph Taylor*, and *Sarah*, his wife, executed a similar conveyance to *John Taylor*.

On the 12th of February, 1809, *Samuel Brewster*, as attorney of *John Taylor*, authorized *Ichabod Williams* to take possession of the tract of 1,000 acres, in *Ulster*, and to bring actions, in the name of *Taylor*, against any person in possession. On the 17th of June, 1791, *William Clark*, *Abraham Russell*, and others, tenants in possession of the land, by a writing under their hands and seals, attorned to *John Taylor*, since which time the said tract has been held under *John Taylor* and his heirs. On the 1st of March, 1805, *Nathan Miller* executed a lease of the premises in question to *Andrew Gee*, for 21 years, who afterwards \*delivered the possession to the defendant, *Abraham Russell*.

The Court below gave judgment for the defendants. The cause now coming on to be heard, the chief justice assigned the reasons for the judgment, which were the same as those stated in the report of the case. (Vol. XI. p. 373.)

*J. Duer*, for the plaintiff in error, contended, 1. That *John Taylor* had no right of entry at the time of the attornment of *Russell*, the defendant, to him; and that the attornment was, therefore, void, and did not affect the possession of the devisees of *Lord Stirling*.†

2. That the proceedings by *sci. fa.* to revive the judgment against the heirs, &c., of *Lord Stirling*, were void, as the widow of *Lord Stirling*, and the tenant of the freehold, was not made a party, or summoned.‡

3. Admitting even that the execution was regular, the premises did not pass by the sheriff's deed. The description was too general. The property sold and described must be identified by a particular description, or by metes and bounds.§

4. *John Taylor* was not a mortgagee within the meaning of the statute. He had no right of entry as a mortgagee; for the legal estate in the premises was not passed by the will of *Mrs. Waddell*, but had descended to *William Waddell*, her heir at law. *John Taylor* could not recover the debt at law, nor foreclose the equity of redemption.||

5. The possession of *John Taylor* was hostile to the heir at law, and to the rights of the executors of *Mrs. Waddell*, and calculated to defeat the execution of the trust created by the

† 1 N. R. L.  
443. sess. 36. ch.  
63. s. 27, 28. (a)

‡ Carth. 167.  
Com. Dig. tit.  
Sci. Fa. (C. 5.)  
And. 161.

§ 1 Johns. Cas.  
284.

|| 2 Fomb. Eq.  
255. 2 Equ. Cas.  
Ab. 192. 2 Vern.  
66. Proc. in Ch.  
15. Cruise's  
Dig. tit. Mortg.  
ch. 1. s. 17.

(a) 1 R. S. 744.

will. In equity, a mortgage is considered as mere personal property, or as debt which passes to the executors. It will not pass under a devise of the real estate, if there are any other lands to feed the devise.† Cases as to trust estates passing under the general words of a devise, are not applicable to the present. The case of *Baybrooke v. Inskep*,‡ where that doctrine is held, is contrary to former decisions, and is, at best, a doubtful authority. A mortgagee, after a forfeiture, is not a trustee at law, but the legal owner. It is clear, that *John Taylor* had no right of entry as mortgagee; and, unless he had such right of entry, the attornment to him was void. If so, the right of the lessors to recover, against *J. Taylor*, is as perfect as \*against the tenant himself. He cannot set up the mortgage, as an outstanding title, for he has not the legal possession.

6. *John Taylor* had not even an equitable interest. The interest in the mortgage debt was wholly vested in the executors of *Mrs. Waddell*, who alone could sue for, and recover the debts: \$ when the legal estate passed to the heir, the equitable interest passes to the executors. One or more of the children of the testator cannot seize and distribute the estate, without the assent of the executor and the other children. *John Taylor* cannot shield himself under the will, when his object is to defeat the will, by taking away the equitable interest of the testators, and stripping the heir at law, *William Waddell*, of his rights. The assent of the executors or heir is not found by the special verdict, and it cannot be presumed or inferred.¶

It will probably be contended; on the other side, that the attornment to *Taylor*, if void, was, notwithstanding, such a commencement of an adverse possession as to bar this action. But if the attornment were fraudulent and void, as certainly it was, he having no right of entry under the will of *Mrs. Waddell*, and no assent to be presumed in his favor, it must be void to every intent. A possession, under such circumstances, cannot be rendered good by any length of time; for the statute declares the attornment to be void, and of no effect.¶

But, admitting the possession of *John Taylor* to have been adverse, such adverse possession is not a bar to the recovery of the plaintiff in this suit; *Catharine Neilson*, one of the lessors, being entitled to the premises as executory devisee, under the will of Lord *Stirling*, and twenty years not having elapsed since her right of entry accrued. It may be urged that the executory devise to *Catharine Duer* was void, as being repugnant to the absolute ownership previously given by the will to *Mrs. Alexander*, according to the decision of the Supreme Court, in *Jackson, ex dem. Brewster, v. Bull*,†† but in that case, the first devisee took an estate in fee, and the limitation over was on an indefinite failure of issue here; a power was given by the will to *Mrs. Alexander* in relation to the property, but on her dying without executing that power, the executory devise was to vest in possession. *Mrs. Neilson* cannot be said to de-

## IN ERROR

ALBANY,  
February, 1816.

JACKSON

v.

DE LANCY.

† 2 Vern. 193.

625. 2 Fonbl.

Eq. 284. 1 Ch.

Cas. 283. 2 Ch.

Cas. 61. 1 Bro.

P. C. 228.

Pow. on Mortg.

683. 2 Fonbl.

279. note. 1 Alk.

[ \* 542 ]

605. Cru. Dig.

tit. Devise, ch.

10. s. 113.

‡ 8 Vesey, 417.

§ 1 Ch. Cas.

4. 51. 2 Ch.

Cas. 29. 50.

Powell on

Mortg. 614.

1047.

|| 1 Caines's

Rep. 63. 1 Burr.

126.

¶ Sess. 36. c.

63. s. 28. 1 R.

L. 443. (1)

†† 10 Johns

Rep. 19.

## IN ERROR.

ALBANY,  
February, 1816.

JACKSON

v.

DE LANCY.

[\* 543]

† 4 Term Rep.  
39. *Fearne's C.  
R. & Ex. Dn.*  
(*Buller's ed.*)  
228.‡ P. 230. *Bul-  
ler's ed.*§ 4 Johns. Rep.  
390. *Burr. Rep.*  
120.|| 7 East's Rep.  
320.

rive her title under the will of Mrs. *Alexander*, for the provisions of it did not vary from that of Lord *Stirling*, but were evidently only intended to effectuate it in the most beneficial manner. The case \*of *Doe*, ex dem. *Willis*, v. *Martin*,† supports the doctrine contended for. In that case, it was held, that, in a deed to trustees, for the use of the grantors for life, a remainder to such children, and for such estate as the grantors should appoint, did not prevent a subsequent limitation to the children, in general, of the grantors in fee, from beginning a vested remainder. "A general power of appointing any estate or interest, *ad libitum*," says *Fearne*,‡ "though enabling him to limit the fee, does not ascertain any estate to be limited; therefore, no limitation of the fee arises, until it be actually appointed under the power. The appointment, when executed, may not reach the fee; it may stop at an estate for life, for years, or in tail; and until the appointment be complete, the power amounts no more to a limitation of the fee than it does of an estate tail, or any other ascertainable interest, equally within the extent of the power, but in which the execution of it may terminate, without limiting the whole fee." This reasoning applies as well to one kind of indefeasible future interest as to another; to an executory devise, as well as to a vested remainder. The appointment, in the present case, did not reach the fee, for no appointment at all was made. Thus the executory limitation to Mrs. *Neilson* was valid; her estate did not vest in possession until the death of Mrs. *Alexander*, and not until then did the statute of limitations begin to run against her.§ Besides, the lease for 21 years, under which *Russell* held, did not expire until 1806: until the lease had expired, the person entitled in remainder could not enter, and, where a forfeiture has been committed, he is not obliged to enter until the end of the term.||

*Oakley*, and *Van Buren*, contra. Without pretending to assert the validity of the conveyance of the 10th of June, 1788, from the sheriff of *Ulster*, they contended that the defendants had shown a sufficient title and estate, under the mortgage to *Ann Waddell*, to bar the action of the plaintiff; this mortgage being a subsisting outstanding title, which they might have set up as a bar, even if they could not have connected themselves in interest with it; still more, when, as in this case, they do connect themselves with it, and claim under it part of the land which it covers. It is true that it did not specify the premises in question, but the general clause, "all other the lands, &c., within the province of *New-York*," was amply sufficient to pass to \*the mortgagee all the lands not described in the deed; which, at the time of its execution, belonged to the mortgagor.¶ Mrs. *Waddell*, the mortgagee, being thus possessed of the legal and equitable estate in the mortgaged premises, on the mortgage becoming forfeited by non-payment, transmitted her equitable interest to her children, by her will. She directed her *outstand-*

[\* 544]

¶ *Plowd.* 289.  
4 *Mod.* 157. 2  
101. *Abr.* 49.  
57. *P. pl.* 45.

ing debts to be collected and distributed among her five children, and by this assignment of the debt, the mortgage followed as an incident, and vested in the devisees, in the same manner, and in the like proportions, as the debt which it was intended to secure.†

But the legal estate under the mortgage, (which is a devisable interest;‡) passed by the general words in the will, whereby the testatrix devised *all the rest of her estate, whatsoever and where-soever*, to her children. That this was the intent of the testatrix, was apparent from her declaration in the preamble of the will, *that she disposed of the whole of her estate, real and personal*, no part of which could she have meant should go to the heir at law, with whom she was at variance; and the expressions which she has used are competent to effectuate that purpose; the debt was given to her children, and, certainly, the testatrix must have intended that the security should follow it. General words in a will, unless peculiarly or technically applicable to real estate, are sufficient to pass mortgage lands,§ unless it be apparent, from the will itself, that the intention of the testator was otherwise; and the authorities show, that any estate may pass under general words in a will.|| If, however, the mortgage lands did not pass by the will, they descended to the heir at law, as trustee for the persons entitled to the debt,¶ who, as *cestuy que trusts*, had a beneficial interest in the land, and cannot be turned out of possession by the title of their trustee;‡‡ and it is now admitted, on the other side, to be a valid subsisting mortgage.

• The estate, then, both equitable and legal, in the premises, having passed, by the will, to the children of the testatrix, *Henry Waddell*, one of the executors, in conformity to the authority given them by the will, conveyed these premises to *John Taylor*, who was then in possession, under the deed from the sheriff of *Ulster*. *Taylor* thus became, at least, beneficially interested, (the act of one executor, in relation to personal property, being binding upon all,‡‡ and the assent of the other to be presumed, it being in unison with his duty,) and might have used the name \*of the heir at law to bring an action of ejectment, or, by an application to chancery, have compelled a conveyance to himself; and he would be the person accountable for the rents and profits in chancery. The deed from *Henry Waddell*, being a general conveyance of all his interest, conveyed his right, as executor, although he did not execute it in that capacity. §§ But, at all events, *Taylor*, exclusive of the right of his wife, held the rights of three of the children of the mortgagee, and so possessed a legal estate under which the defendants can protect themselves in this action; for the legal estate must prevail at law,||| and may be set up by the tenant as a bar to an action by the *cestuy que trust*, or person having the equitable title. This doctrine is not shaken by the cases of *Hitchcock v. Harrington*,¶¶ and *Col-lins v. Torrey*,‡‡‡ for in neither of those cases was the mortgage,

IN ERROR

ALBANY  
February, 1816

JACKSON

V.

DR LANCY.

‡ 3 Johns. Cas.

322.

‡ Pow. Mortg.

438.

‡ 2 P. Wms.

198. 201. Co.

Litt. b. 3. note,

96. Cur. Dig.

tit. 38. c. 10. s.

113. 116. 117.

118. 2 Ch. Cas.

51. 3 Ves. 348.

714.

‡ Pow. Mortg.

444. 692. 693.

6 Cru. Dig. 231.

1 Atk. 605. n. 3

Term Rep. 122.

5 Ves. 340. Ves.

41. 1 Vern. 4.

‡ Pow. Mortg.

688. 689.

‡ Burr. Rep.

1898. Coop. 46.

Doug. 721. 771.

1 Term Rep.

737. 758.

‡ Toll. L. of

Ec. 360.

[ \*545 ]

‡ Ld. Raym.

1306.

‡‡ Doug. 722.

771. 1 Term

Rep. 735. 1

Term Rep. 684.

7 Term Rep. 46,

47. 8 Term

Rep. 122. 5

East's Rep.

138. 2 Joins.

Rep. 84. 226. 3

Johns. Rep. 423.

8 Johns. Rep.

483.

‡‡‡ 6 Johns.

Rep. 290.

‡‡‡ 7 Johns.

Rep. 278.

IN ERROR.

ALBANY  
February, 1816.

JACKSON

v.

DR. LANCY.

† 1 Coles's Rep.  
90.

produced by the defendant, a subsisting encumbrance, and the Court has never said that even a stranger might not avail himself of an unsatisfied mortgage. The entry of *Taylor* was not an ouster of the heir at law, and, after this lapse of time, a conveyance from the heir to the party in possession ought to be presumed.†

It is not competent for the plaintiffs, who, in this respect, are strangers, to raise the question, to whom the legal estate passed, whether to the heir, the executor, or the devisees. It is perfectly immaterial to them, who is entitled to the possession. Whoever may be in possession will be held, by the Court of Chancery, a trustee for the mortgagor, and so accountable for the rents and profits; that Court, on a bill to redeem, would not require the executor, or heir at law, to account. If, then, the Court of Chancery, as certainly it would, would make the person in possession account for the rents and profits, where was the propriety of instituting this suit? The fact of attornment can make no difference; it is immaterial to the plaintiff, whether it was made to *Taylor*, or to the heir at law; in neither case can his interest be affected; the party in possession was still a trustee, and the plaintiff's lessors ought to have vindicated their rights by a bill to redeem.

But if the plaintiff is authorized to raise the question of attornment, we deny that it was void, and contend that it came within the proviso of the act which saves an attornment "made with the privity and consent of the landlord or lessor, or to any \*mortgagee after the mortgage is become forfeited."† *Taylor* had a right, at least, in part of the land, and, as tenant in common, he held for all the devisees. He had an equitable interest in the mortgage debt, which alone was sufficient to enable him to accept an attornment. An attornment to a *cestuy que use* is valid.§ And further, as *Russell* took the land from *Miller*, as his tenant, and *Miller* transferred the possession to *Taylor*, *Taylor* had a legal possession. After the lapse of twenty-three years, the assent of the landlord to the tenant, to make attornment, and of the heir at law to *Taylor*, to receive it, is to be presumed.

Though it is not necessary to agitate the question of adverse possession, it may be confidently asserted that the right of entry of the plaintiff's lessors is barred by the statute of limitations. *Taylor* entered under a claim of title—a claim of title consisting of two branches; one good, that is, the mortgage; the other bad, the deed from the sheriff of *Ulster*; but, however bad the latter may be, it is sufficient for the present purpose; it determines the nature and character of his possession, and shows it to have been hostile to the rights of the lessors of the plaintiff. The attornment to *Taylor* was available for the same object; that attornment, if fraudulent and void, as an attornment, yet deci-

[ \* 546 ]

† *Sess. 36. c.*  
*63. s. 2. 8 R. L.*  
*443. (a)*§ *Co. Litt. 310.*  
*a.*

sively marks the intent of *Taylor* to hold the land in opposition to the former proprietor. IN ERROR.

Nor are the excuses, which have been offered on the other side, for their neglect in entering, sufficient. *Taylor* entered in 1789, under claim of title, during the life of Mrs. *Alexander*, and the statute began to run from that time, without regard to the disability of Mrs. *Neilson*: she must be concluded by the neglect of the particular tenant. The cases in which the reversioner, or remainderman, cannot be affected by the *laches* of the tenant for life, are where the tenant for life has no power to alienate or encumber. Here Mrs. *Alexander* had authority to sell, or devise, the land in fee. Such sale, or devise, would have been binding on the remainderman. If the remainderman, or reversioner, be not bound by the acts, he is not concluded by the *laches*, of tenant for life; but where the acts of the particular tenant are obligatory on him, he must, also, be barred by his *laches*. Further, Mrs. *Neilson* has no other title than a *cestuy que trust*, under the will of Mrs. *Alexander*, and her estate, being a continuation of that of her testatrix, can be in no better plight then it was when in the hands of the person from whom she received it; she takes nothing under the will of Lord *Stirling*, for the limitation to her is void, as being repugnant to the antecedent devise.† The possession of *Nathan Miller*, which was merely found by the jury to have existed at the time of the death of Lord *Stirling*, is altogether inoperative;‡ he was a mere tenant at will; a lease by the mortgagor, after a forfeiture of the mortgage, is a nullity,§ and the lease from *Miller* to *Russel* could not suspend the right of entry.

*Henry*, in reply, said, that the points arising in this case were merely questions of law, and if *John Taylor* had no right of entry, either under the sheriff's deed, or the will of *Ann Waddell*, the plaintiff had pursued the proper course in bringing an action of ejectment.

The defendants have, in fact, set up a title under the sheriff's deed; else why did they produce, at the trial, the documents in relation to the sale under the execution? This Court, therefore, must pass upon that title, which was void, as well because there was no sufficient revival of the judgment, as because the premises in question were not described in the deed; they were not known as being intended to pass by the sale, and, consequently, could not have entered into the contemplation of purchasers in calculating the price. *Taylor*, then, having no right of entry under the sheriff's deed, if he can show no other title, the attornment to him must be void. An attornment to any other than the legal owner is void.

Having disposed of this question, he proceeded to inquire if *Taylor's* entry was protected by the will. This, he said, was the turning point of the case; and if *Taylor* had a right of entry at law under the will, the plaintiff must fail. To understand

ALBANY,  
February, 1816.

JACKSON  
v.  
DE LANCY.

[ \* 547 ]

† 10 *Johns.*  
*Rep.* 19.

‡ *Gilb. Tenures*, 90.

§ *Doug.* 21.  
*Pow. Mortg.*  
226, 227. *Cru*  
*Dig.* tit. 15. c. 2  
s. 6.

## IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DE LANCY.  
† 2 Johns. Rep.  
75.† 7 Johns.  
Rep. 278.§ 7 Johns.  
Rep. 376. 380.

[\* 548]

Pow. Mortg.  
683. Prec. Ch.  
11. 1 P. Wms.  
295.† 4 Johns. Rep.  
41.† Pow. Mortg.  
689, 690. 2  
Vern. 193.

this part of the subject, it became necessary to consider the nature of the respective interests of mortgagor and mortgagee.

The mortgagor, even after forfeiture, until foreclosure, or entry by the mortgagee, is, to all intents, the owner, and in the seisin of the land;† and may take the rents and profits without accounting to the mortgagee; his widow is entitled to dower out of it;‡ he may grant it, devise it, vote upon it; and an outstanding mortgage, not foreclosed, is not a breach of the covenant of seisin in a deed.§ But the interest of the mortgagee is merely a personal chattel,|| which cannot, before foreclosure, be sold \*by his creditor under an execution;¶ he cannot encumber the equity of redemption by a lease for the shortest term, even after forfeiture; if he takes possession of the land, he becomes a trustee to the mortgagor, and must account to him for the rents and profits; and, after his death, his estate goes not to his heir but to his personal representatives.††

From a review of the cases in which the question has been discussed, how far general words in the will of a mortgagee may include a mortgage, the following rule may be laid down as the result: "that no general words applicable to the realty, will pass a mortgage interest, (which has been shown to be merely a chattel,) where the equity of redemption has not been foreclosed or released, or the mortgagor has not procured the possession."†† There are no expressions in this will that can take the case out of the rule which is here stated. The testatrix directs her executors to sell all her estate, and distribute the proceeds among her five children, who are to be *tenants in common in fee, of the realty*, until such sale and distribution. These are the only words, if any, that can have effect, and surely they do not reach the mortgage. The words *whatsoever and wheresoever* only apply to the power of the executors to sell, and had the subsequent clause been omitted, all the lands of the testatrix would in the mean time have gone to the heir at law. The power to the executors to sell could not apply to the mortgage lands, until after foreclosure, their authority only extended to such lands as the testatrix might have sold and conveyed in fee. The case of *Hutchinson v. Savage*, §§ which has been cited on the other side to support the deed from *Henry Waddell to Taylor*, as a grant of his interest as executor, has no application; indeed, it makes against them; for it shows that a general grant will not pass an interest which the grantor possesses in a representative capacity, unless he have no interest of his own upon which it can operate. Since, then, the legal right to the premises did not pass to the devisees under the will, it must have vested either in the heir at law, or the executors, and the defendants are now seeking to connect themselves with the legal estate, in order, unjustly, to oust the heir of his rights—an object which no Court will sanction.

When the attornment was first made to *Taylor*, his interest,

†† 1 Vern. 4. n

§§ *Ld. Raym.*  
1306.



at any, extended but to two fifths of the land, so that there is no room for presuming the assent either of the executors or the heir. But their assent is not found, and therefore cannot be presumed on a special verdict.†

Since, then, *Taylor* had no right of entry under the will of Mrs. *Waddell*, he cannot connect himself with the mortgage; he is a mere stranger, and a stranger cannot set up an outstanding mortgage in an action of ejectment by the mortgagor.‡ No person can avail himself of a mortgage but the mortgagee, and those who stand in his place. The defendant, *Russell*, entered as lessee under a title derived from Lord *Stirling*, and he cannot be allowed to contest the right which he has once recognized.§

The possession acquired by *Taylor*, being under a fraudulent attornment, is not adverse to the plaintiff's lessors; but, admitting that it were, still, as Mrs. *Alexander* did not die until 1805, and Mrs. *Neilson* was then a feme covert, the statute has not yet begun to operate upon her rights.

THE CHANCELLOR. The premises in question were originally owned by Lord *Stirling*, and the lessors of the plaintiff claim title under him. The defendants set up title under a mortgage which Lord *Stirling* executed to *Ann Waddell*, in 1771. A part of the debt, secured by the mortgage, was prosecuted at law, to judgment and execution, and *John Taylor*, under whom the defendants held, took, as purchaser, a sheriff's deed of the premises under the execution; and he was, also, at the same time, entitled, under the will of *Ann Waddell*, to two fifths of her estate.

If *Taylor* acquired a title under the sheriff's deed, or was entitled to the land under the will, the lessors of the plaintiff cannot recover. There is nothing in the case to warrant an inference that the mortgage has been satisfied or discharged; and in respect to the questions arising under the special verdict, it is to be considered as a subsisting encumbrance.

I am induced to think that the title set up by the defendants under the sheriff's deed, cannot avail them. Two objections are made to that title;—1. That the *scire facias* reviving the judgment was not duly directed and served; and, 2. That the premises were not duly sold by the sheriff. Of these objections, one appears to be solid, and the other not.

1. The *scire facias* was directed to the heirs of Lord *Stirling*, and served on them; but that service was of no use, for they took nothing by descent. Lady *Stirling* was the devisee of the real estate; and she was, consequently, the tenant of the freehold, and ought to have been the party to the writ. It was the same thing, as to her rights, as if execution had issued, and the lands been sold on the dormant judgment against Lord *Stirling*, without any revival by *scire facias*. Still, I take the law to be that even the omission altogether of the *scire facias* will

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DR. LANCY.  
† Bac. Abr.  
Verdict, (R.)  
‡ 6 Johns. Rep.  
294. 7 Johns.  
Rep. 232.§ 1 Caines's  
Rep. 444. 2  
Caines's Rep.  
215. 3 Johns.  
Rep. 223. 499.  
6 Johns. Rep.  
35

[ \* 550 ]

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DE LANOY.

not, as of course, render void a sale under the execution. An execution issued on a judgment after a year and a day without revival, has been held to be voidable only, and a justification to the party under it, until set aside. (3 *Caines's Rep.* 270. 8 *Johns. Rep.* 365.) The *scire facias* is intended as notice to a party to show cause why execution should not issue, and to give him an opportunity to plead payment, or other discharge; and if it be omitted in a case requiring it, he would, no doubt, be entitled to relief, on proper application. But in this case the execution has been permitted to stand to this day without being regularly questioned by Lady *Stirling*, or her representatives. She lived seventeen years after the execution had been thus irregularly issued; and it cannot but be presumed, that the service of the *scire facias* on her daughters came seasonably to her knowledge; and even ten years have elapsed since her death, and no attempt appears to have been made by her heirs or devisees to set it aside. I presume that the Supreme Court would not now sustain a motion to set aside the execution for irregularity, after so great a lapse of time. That Court has once said, (*Thompson v. Skinner*, 7 *Johns. Rep.* 556.) that, after the lapse of 20 years, no judicial proceeding whatever ought to be set aside for irregularity; and it has been denied in other Courts, (2 *Bay*, 338.) even after 12 years. The objection is infinitely stronger when the attempt is made to question the regularity of the execution, and to set aside the title under it, in this collateral action. The regularity of the revival of the judgment by the *sci. fa.* was not the point in issue in this cause. It was held, in the Supreme Court of *Pennsylvania*, in *Heister v. Fortner*, (2 *Binney*, 10.) that a judgment revived by *sci. fa.* after a year and a day, upon one *nihil* only, which is the same as no summons, may be set aside for irregularity, or reversed on error, but that the irregularity cannot be noticed, collaterally, in another suit; and that, even if the judgment should, for that cause, be reversed, or set aside, a purchaser at a sheriff's sale would hold the land. A \*similar doctrine was laid down by Lord *Redesdale*, in *Bennett v. Hamill*. (2 *Scole & Lefroy*, 566.) where it was held, that a purchaser under a decree should not be affected by error in the decree, in its not having given a day to an infant defendant to show cause.

[\* 551]

This doctrine appears to me to be very reasonable, and conducive to the public good. It is intended to impose upon parties the necessity of looking into mistakes in proceedings before they become stale and forgotten; and it tends to quiet purchasers, by giving security to judicial titles. The first objection, therefore, to *Taylor's* title under the execution, from the want of a regular revival of the judgment by *scire facias*, falls to the ground.

2. The next objection is, that the premises did not pass by the sheriff's deed; and here I think the objection is well taken.

The sheriff's deed contains all the evidence we have of the

sale ; and it recites, that, by virtue of the execution, the sheriff seized the tracts and parcels of land therein mentioned and described, and that he exposed the same separately to sale, and sold each of them to *John Taylor*, for 50*l.*, making, in the whole, 100*l.* It then states, that, by virtue of the execution, and in consideration of the said 100*l.*, he conveyed the said two tracts of land, by metes and bounds, to *John Taylor*. The deed then adds, by a general clause, these words : "and also all other the lands, tenements, and hereditaments, whereof the said *William, Earl of Stirling*, was seised within the county of *Ulster*." It was under this general clause that the premises were intended to be conveyed, whereas it would appear from the deed that the levy, and the exposure to sale, and the price bid, applied only to the pieces or parcels of land which were therein mentioned and described. It appears to me to be altogether inadmissible, that the property of a defendant should be swept away on execution, in this loose, undefined manner. It would operate as a great oppression on the debtor, and lead to the most odious and fraudulent speculations. No person attending a sheriff's sale can know what price to bid, or how to regulate his judgment, if there be no specific or certain designation of the property. In this case, the price was given for the land described, and not for lands which, we are to presume, were then wholly and equally unknown to the sheriff and the purchaser. It was the same thing to the purchaser, as if no such land existed. \*To tolerate such judicial sales, would be a mockery of justice. It ought to be received as a sound and settled principle, that the sheriff cannot sell any land on execution, but such as the creditor can enable him to describe with reasonable certainty ; so that the people whom the law invites to such auctions, may be able to know where, and what, is the property they are about to purchase. Perhaps the case may be different, if the description in the mortgage be general, and the mortgagee sells under a power, and the mortgagor will not come forward at the sale, and point out and identify the lands. The sale, in such a case, depends upon the contract of the parties ; but sales by process of law are under the protection of rules established for the common safety ; and I see no possible ground to hesitate concerning the policy or the justice of the rule in this case. The title, therefore, set up by the defendants, under the sheriff's deed, totally fails.

3. There was another ground of defence mentioned and discussed upon the argument ; and that was the existence of an adverse possession of 20 years, sufficient to toll the plaintiff's entry. From the time that *Miller* and the other tenants surrendered their possessions to *Taylor*, to the time of bringing the suit, above 20 years had elapsed, and if the statute of limitations had begun to run from the time of that surrender, the lessors of the plaintiff would undoubtedly have been barred. But it did not begin to run, for reasons which I shall presently men-

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DE LANCY.

[ \* 552 ]

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DE LANCY.

[\* 553]

tion. It has been urged, that there was a suspension of the statute by reason of coverture, rights in remainder, &c. This, however, is a mistake. There was no disability on the part of Lady *Stirling*, and she owned the whole estate, in fee, under her husband's will, at the time of *Taylor's* entry. The devise to her was of "all the real and personal estate, whatsoever, &c.;" the word *estate* here carried a fee, and the further provision in the will, that, if she died "without giving, devising, selling, or assigning it, &c.," the estate should go to his daughter *Catharine Duer*, was not a good limitation by way of executory devise, as such a limitation was repugnant to the power to sell, and, consequently, void. This was the decision of the Supreme Court in *Jackson v. Bull*, (10 *Johns. Rep.* 19.) and nothing has been urged to show why that decision is not to be regarded as correct. Lady *Stirling* was then the owner of the equity of redemption, and *Miller* was her tenant, at the time of the surrender of the possession to *Taylor*. \*But the reason why the statute of limitations did not then begin to run against her, is this, that the surrender was not, *of itself*, and without reference to the title of *Taylor*, a disseisin or ouster sufficient to set the statute in motion. There is no *fact* found by the special verdict amounting to an ouster, unless it be, what is termed in the case the attornment of the tenants, in acknowledging to hold, or accepting leases, under *Taylor*, instead of Lady *Stirling*. But unless *Taylor* was lawfully entitled to the possession, this attornment could not, in any way, prejudice the rights of Lady *Stirling*, and it was, of itself, null and void. The statute on this subject declares, that *no attornment of a tenant to a stranger shall be construed in any wise to have changed, altered, or affected the possession of the landlord, except the same be made with the consent of the landlord, or in pursuance of a judgment, or made to a mortgage, &c.* This brings us to the last and main question in the case, and that is, Can *Taylor's* entry be protected under the mortgage from Lord *Stirling* to Mrs. *Waddell*? Every other point of defence having failed, the whole cause turns upon the solution of this interesting question.

The will of Mrs. *Waddell* sets out with a declaration that she disposes of *her whole estate, real and personal*, and, after some specific legacies, she directs her executors to collect all her outstanding debts, and that all the *rest of her estate in Hardenberg's patent, and elsewhere, whatsoever, and wheresoever*, be turned by them into money, and be equally distributed among her five children, share and share alike, "who are to be tenants in common in fee of the realty, until such sale and distribution be made." It is very clear to me, from this will, that Mrs. *Waddell* did not intend to die intestate, as to any part of her estate. She did not intend that her eldest son, *William*, (and whom she, evidently, in the same will, rebukes for his disobedience,) should inherit any part of her estate, whatsoever, as heir at law, in preference or in exclusion of her other children. She meant

that the mortgage debt of Lord *Stirling* should go as the rest of her estate went. She probably knew nothing of the distinction between a beneficial interest in the mortgage debt, and a dry, technical, legal estate in the mortgaged premises. If the distinction was known to her, she never intended that her eldest son should avail himself of it. If the mortgage was personal estate, she meant that the executors should take and distribute it; and if it was real estate, capable of enjoyment, and of being devised as such, she meant \*it to go, as part of the *realty*, to her five children equally, as tenants in common. There is no doubt in my mind that this is the fair and obvious intention of the will; for the language is plain and unambiguous, and there is no provision inconsistent with this intention.

We are, however, here met with a difficulty which is supposed to be insuperable, and on which the main stress of the argument on the part of the plaintiff was laid. It is admitted that the words of the will are sufficient to pass to the five children all the real estate which Mrs. *Waddell* held in her own right; but it is said to be a settled rule of law, in the construction of wills, that general words, such as *lands*, *tenements*, and *hereditaments*, the *realty*, or other words particularly appropriated to real estate, will not carry an interest in land, which the testator holds as mortgagee or trustee; that unless the will specially refers to such an interest, it will not pass by the usual devise of the real estate; and that though, strictly and technically speaking, the mortgagee has a legal estate in fee in the mortgaged premises, yet that estate must descend, as undevised property, to the heir at law, rather than pass with the rest of the estate by such general words.

If this be the rule of law, whatever we may think of it, we are bound to obey it. On this point I fully agree with the learned counsel for the plaintiff. No man feels more strongly than I do, the duty incumbent on every member of this Court to declare the law, truly and strictly, in all our judicial decisions. We sit here, not as a branch of the legislature, but as a Court of justice, and we must not, in any case, set up the authority of our own "right reason" as paramount to the law which we are sworn to administer. But it is unnecessary to press these reflections. I have satisfied myself, and, perhaps, I may be able to satisfy others, that the rule of law is *not* as was stated on the part of the plaintiff; but the rule is, that the same words in a will which will carry any other estate will carry, also, the legal estate held in trust under a mortgage.

This latter is, upon the whole, the most convenient rule, though I admit it cannot be very material, as it respects the interest of parties, which way the rule is settled; for, whoever takes a trust estate, whether it be the heir, by descent, or the devisee, by will, he must take it as trustee merely, and is equally responsible in the one capacity as the other. But, if the public

IN ERROR.

ALBANY  
February, 1816.JACKSON  
v.  
DE LANCY.

[\* 554]

## IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DE LANCY.

interest is not much concerned in settling the rule, there is the \*less reason for refusing to construe the words of a will according to their ordinary meaning. Lord Rosslyn has said (5 *Vesey*, 339.) that it would be more convenient that trust estates should pass by general words, because it is more convenient for those who are concerned in the trust to find the devisee than the heir; and if this be the case in *England*, the convenience is vastly increased with us; because, in *England*, the eldest male is, alone, the heir at law, but with us all the children, male and female, inherit together. And if the beneficial interest in the mortgage debt is given to the devisee, the inducement is still stronger to give him the legal estate; for why should the legal and the beneficial interest in the mortgage premises be, unnecessarily, separated? What possible use would there be in allowing the legal estate in the mortgage to descend in this case to *William Waddell*, the heir at law, when he would, as heir, be only a mere naked trustee for those who were entitled to the beneficial interest in the mortgage debt under the will? It would be far better, on the score of convenience and simplicity, to let the legal and equitable interests under the mortgage go together, as they in fact existed together in the person of Mrs. *Waddell* at the time of her death.

The rule, as now settled, is this, that trust estates will pass by the usual general words in a will passing other estates, unless it is to be collected from the expressions in the will, or the purposes and objects of the testator, that it was his intention they should not pass. This was the rule as declared by Lord Ch. *Eldon*, in *Braybrooke v. Inskip*, (8 *Vesey*, 407.) after much examination and reflection. In that case, *A.* held land in trust, and by will devised all his real and personal estates whatsoever, &c., to his wife, and it was held by the master of the rolls, and afterwards by the lord chancellor, that the legal estate in the trustee passed by this general devise. The lord chancellor said this was a question of intention of the testator, and the weight of convenience was in favor of the rule. The will was large enough, and there were no expressions in it authorizing a narrower construction, and no purpose inconsistent with an intention to pass the trust estate to the devisee. He said there was no case establishing a different rule; and that if there was any such case, he would abide by it. The rule, according to the old cases, unquestionably was, that a trust estate would pass by general words.

[ \* 556 ]

\*This is the final decision in the *English* Courts, on the very point which has been raised and discussed in this place; and after the decided opinion of so laborious and able a lawyer as Lord *Eldon*, we may well doubt whether the learned counsel for the plaintiffs have not been mistaken in their apprehension of the rule of law. It is admitted on all hands, that a mortgagee holds the mortgaged lands in trust; and when it is said that a

devise of real property will, ordinarily, pass a trust estate, all the cases consider it as applying as well to a mortgagee as to any other trustee; and, indeed, it applies the stronger to that case when we find that the devise does actually pass the beneficial interest in the mortgage debt.

The case of *Roe, ex dem. Reade, v. Reade*, (8 Term Rep. 118.) in the K. B., declares the same rule. A., having estates, of his own, and having another estate which he held as a mere naked trustee, without any interest, devised all his estate, whatsoever and wheresoever, *after payment of debts and legacies*. The question was here between the heir and devisee, which of them took the trust estate, and the K. B. put it entirely on the ground of intention. The general words seem, both by the counsel and the Court, to have been admitted to be sufficient to pass the trust estate; but as the testator had here charged all his lands devised with the payment of debts and legacies, it was decisive evidence that he did not intend to pass the trust estate by that will, because he had no right to charge it with such payments; and as the intention in this case was manifest, for that reason, and that reason only, the trust estate was held not to pass. So, in another case, (*Ex parte Morgan*, 10 Vesey, 101.) Lord Eldon held, that, where a mortgagee had devised all his real estate, charged with an annuity, it could not be considered as his intention to pass the mortgage estate, because that estate was not his own. He only held it in trust for a special purpose, and he had no right to charge it with an annuity.

Here, then, we have the decisions of the Courts of law and equity in *England*, uniting in the rule as I have stated it; and if we go back, as Lord Eldon did, to the old cases prior to the revolution, and which are to be received strictly as authority, we shall find them containing and expounding the same doctrine.

I begin with the case of *Winn v. Littleton*, (1 Vernon, 3. 2 Ch. Cas. 51.) decided, as early as 1681, by Lord Nottingham, whom Sir Wm. Blackstone always mentions with the reverence \*due to the father of the *English* system of equity jurisprudence. The testator, in that case, was seised of divers lands in his own right, and divers lands as mortgagee, and he devised all those lands he held in his own right by specific designation, and adds, *or elsewhere within the kingdom of Wales*, and he charged his lands devised with a rent charge for life. The question was, whether the lands held in mortgage passed by the will, and it was held that they did not, because it appeared not to be the testator's intention, as he made special mention of his own lands, and not of the other. But another and a stronger reason was assigned by the Court; and this was, that the testator had charged the lands that passed by the devise with a rent charge for life, and he could not be thought so improvident as

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DE LANCY

[\* 557]

## IN ERROR.

ALBANY,  
February, 1816.JACKSON  
v.  
DE LANCY

to grant a rent for so great an estate, and of so long a continuance as for life, out of mortgage lands which were every day redeemable.

This decision places the question, whether a trust estate will pass by general words, on the same ground that it was placed by Lord *Eldon*, 120 years afterwards. It is a question altogether of intention, and to be gathered from the scope and design of the whole will. If the intention be not otherwise pretty clearly expressed, and it be not inconsistent with the nature of the other provisions in the will, the understanding is that the trust estate will pass.

The case of *Marlow v. Smith* was the next decision on the point. (2 P. Wms. 198.) It was decided in the time of Lord *Macclesfield*, in 1723. The testator devised part of his estate to *A.*, and *all the rest and residue of his estate to B.* It was held by the master of the rolls, that the land which he held as a bare trustee, passed by these latter words, for the legal estate was *his* estate in the eye of the law; and there was, it was said, no inconvenience in this construction, for the devisee would be equally a trustee. So again, in the modern case *Ex parte Sergison*, (4 Vesey, 147.) the master of the rolls, afterwards Lord *Alvanley*, and Lord *Rosslyn*, were both inclined to the opinion, that a mortgage estate would pass by general words in a will, such as *all the rest, residue and remainder of my estate, real and personal, of what nature or kind soever.*

In addition to this weight of authority, I might add the opinions of Mr. *Butler*, in one of his notes to *Coke on Littleton* (Co. Litt. 203. b. n. 96.) and of Mr. *Sanders*, in his note to \*1 Atk. 605., and both these writers bestow some pains on the question, and each cites a case, to the same effect, and not elsewhere reported.

[\* 558]

Then, what are the authorities on which the counsel for the plaintiff have relied? We may well ask this question after the cases which have been mentioned, and after Lord *Eldon* has said that he knew of *no case* against the general rule which has been stated. They rely, in the first place, on a loose observation in the case of *Strode v. Russell*, in 1708, (2 Vern. 621.) in which it is stated to have been agreed by the chancellor, assisted by the master of the rolls and two judges, that mortgages in fee, though forfeited when the will was made, did not pass by the general words. There is nothing in the case to the point but this single observation; and Mr. *Sanders*, in the note to which I have alluded, says, that this case affords no argument on either side, as the decree takes no notice of any mortgages, except those whereof the testator had, after the making of the will, purchased the equity. The next authority, more confidently relied on, is an observation of Lord *Hardwicke*, in *Casborne v. Scarfe*, (1 Atk. 605.) in which he says, that by a devise of *all lands, tenements and hereditaments*, a mortgage in fee wil not pass, unless the



equity of redemption be foreclosed. This does not appear to have been the point in the cause, and it is rather to be considered as an extrajudicial *dictum*; and Lord *Eldon* declared (8 *Vesey*, 436, 437.) that he did not believe Lord *H.* ever said so. And when this *dictum* was cited in another case, (4 *Vesey*, 149.) the then solicitor-general, Sir *John Mitford*, told the Court that Lord *Northington* and Lord *Thurlow* had overruled that opinion.

Another case relied on by the plaintiff's counsel, is that of the *Duke of Leeds v. Munday*, (3 *Vesey*, 348.) in which the master of the rolls (Lord *Alvanley*) is made to concur in opinion with Lord *Hardwicke*. We find, however, that he afterwards declared (5 *Vesey*, 341. *note*.) that the opinion imputed to him in this case was not correct; and that he did not mean to decide the question, but made a conditional decree, on account of his doubts. The last case mentioned is that of the *Attorney-General v. Buller*, (5 *Vesey*, 339.) in which Lord *Rosslyn* seems to intimate that a trust estate will not pass by general words in a will; and yet, strange as it may appear, he afterwards said (8 *Vesey*, 437.) that he was overborne in that case by some observations \*of the attorney-general, and that his opinion was rather with Lord *Eldon*.

On reading these latter cases, we are almost involuntarily led to pause, and wonder at the extraordinary and very unaccountable perplexity, doubt, and alternation of opinion, which they discover on this point. The learned men referred to in these cases, do not appear to me—with all proper humility be it spoken—to have examined this question with the diligence or the talent worthy of the eminent reputation they bear. If, indeed, they did, the reports have done them great injustice. Lord *Eldon* had studied the question with profound attention, and he showed it to be perfectly clear and settled; but in the other modern chancery cases on this point, we find nothing but what tends to expose the inefficacy of legal learning, and the weakness of human reason.

I have thus finished a review of all the material cases on the subject; and if the Court have had the patience to attend to this dry detail, I presume they must be satisfied that there is no technical rule of law to withstand the intention of the will. And when Mrs. *Waddell* directed, that *all the rest of her estate in Hardenbergh's patent, and elsewhere, whatsoever, and where-soever, should be turned into money, and distributed among her five children, who should be tenants in common, in fee of the realty, until such sale and distribution be made*, she intended that her legal and beneficial interest in the mortgage debt, and premises, should pass with the rest of her estate. It follows, then, of course, that *John Taylor* was authorized to enter under the mortgage, in right of his wife, and of Mrs. *Miller*, two of the daughters of *Ann Waddell*, and that the notion of an illegal

IN ERROR.

ALBANY,  
February, 1816.JACKSON  
V.  
DR. LANCY.

[\* 559]

**IN ERROR.**ALBANY,  
February, 1816.JACKSON  
v.  
DE LANCY.

[\* 560]

and fraudulent attornment to *Taylor* is totally without foundation. We may consider his possession as the possession of all the claimants under the will.

Even if the technical legal estate in the mortgage had descended to the heir, he would have been but a mere trustee for all the children to whom the beneficial interest was devised, and they would have been entitled to use his name to recover the money, or to foreclose the mortgage, or to gain possession. This was so declared by Sir *John Strange*, in the case of *Attorney-General v. Meyrick*, (2 *Ves.* 44.) And though it is not now necessary to give any opinion on that point, I should incline to think, that, even in that case, the children of *Mrs. Waddell* \*could protect themselves in the entry and possession, under the mortgage.

But I need not pursue the subject farther. I have examined the case on every point, and am of opinion that the judgment of the Supreme Court ought to be affirmed.

April 1st.

This being the unanimous opinion of the Court, it was, there-upon, ORDERED and ADJUDGED, that the judgment given in this cause be affirmed, and the record remitted, &c.; and that the plaintiffs in error pay to the defendants in error their costs, to be taxed, &c.

*Per totam Curiam.* Judgment affirmed.

April 2d.

A motion was made, on the part of the plaintiffs in error, for double costs.

Costs.

THE CHANCELLOR. The 14th section of the act concerning costs, applies only where the writ of error is sued out by the defendant below. That section is a transcript of the statute of 13 *Car.* II.; and such has always been the construction of it. (*Hullock on Costs*, 280, 281.) The decision of the Supreme Court, in *Peters and Gedney v. Henry*, (6 *Johs. Rep.* 278.) is to this point. The 14th section gives double costs, for delay of execution, and that is understood to apply only when the plaintiff below recovers. The defendants are entitled to single costs only, under the 12th section of the act.

*Per tot. Cur.* Single costs only awarded.

\*DAVID GELSTON and PETER A. SCHENCK,  
*plaintiffs in error,*  
*against*  
 GOULD HOYT, *defendant in error.*

IN ERROR.

ALBANY,  
February, 1816.GELSTON  
v.  
HOYT.

IN ERROR, to the Supreme Court, on a bill of exceptions, in which were set forth the pleadings and demurrer, that judgment was given for the plaintiff below upon the demurrer, and the proceedings at the trial, where a verdict was found for the plaintiff for 107,369 dollars and 43 cents damages. The proceedings of the Court below, after the trial, upon the bill of exceptions, were not stated.

The declaration, which was in trespass, contained five counts: 1. That the defendants below, on the 10th of July, 1810, took, and carried away, the goods and chattels of the plaintiff, of the value of 200,000 dollars. 2. That the defendants, on the same day, took, and carried away, a vessel of the plaintiff, called the *American Eagle*, together with her tackle, apparel, and furniture, 500 tons of stone ballast, 100 hogsheads of water, 130 barrels salted provisions, 20 hogsheads of ship bread, of the value of 200,000 dollars. 3. For carrying away the vessel, &c. as in the last count, and damaging, spoiling, and converting and disposing thereof to their own use. 4. For taking and seizing a certain vessel of the plaintiff, of the value of 200,000 dollars, in which the plaintiff intended, and was about to carry, and convey, certain goods and merchandises, for certain freight and reward, to be paid to him, and keeping and detaining the same

Where the plaintiff in the Supreme Court demurs to the defendant's pleas, who joins in demurrer, and, the cause being called on, the defendant's counsel declines arguing the demurrer, and judgment is, of course, given for the plaintiff, the defendant cannot, on bringing a writ of error, object to the propriety of the judgment which had thus passed against him by default.

(a) No point can be raised in a Court of appellate jurisdiction which was not argued in the Court below. The actual and

peaceable possession of a chattel, is sufficient to maintain an action of trespass. (b) An admission of the counsel of the plaintiff on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages; and, therefore, evidence on the part of the defendant, in the nature of a justification of the act, is inadmissible by way of mitigation of damages.

An officer of the revenue, seizing goods, as forfeited, and causing them to be libelled and tried, in an action of trespass, by the owner, can only plead a condemnation, or an acquittal, with certificate of probable cause.

The judgment or decree of a Court of competent jurisdiction, binds only parties or privies.

Where a vessel is seized as forfeited, by the surveyor of a port, under orders from the collector, and is libelled in the District Court, the surveyor and collector are privies, as it is to be presumed, nothing appearing to the contrary, that the seizure was made in consequence of information given by them to the government; and they are bound by the decree of the District Court. But if they are not informers, yet they are privies, by virtue of their office, and act of seizure.

A decree against the principal binds the agent, who must look to the principal for an indemnity.

A sentence of restitution in the District Court of the *United States*, of a vessel which had been seized by revenue officers, is conclusive evidence, in an action of trespass, brought by the owner against the officers, that the seizure was illegal.

A decree, in proceedings *in rem*, of a Court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is binding upon all persons.

It is not for Courts of law to determine whether a revolted colony has become an independent state, but for the government alone, and until the government solemnly recognize its existence as a nation, Courts are bound to consider the ancient state of things as remaining.

The ports of the island of *St. Domingo*, respectively under the government of *Petion* and *Christophe*, are not independent states, within the meaning of the act of congress, of the 5th of June, 1794.

Where a writ of error is brought on a judgment for the plaintiff in an action for a tort, and the judgment is affirmed, the defendant in error will not be allowed interest on the judgment.

(a) Vide *Houghton v. Barr*, 4 *Wendell's Rep.* 175.

(b) *Aikin vs. Buck*, 1 *Wendell's Rep.* 466. *Rochester v. Donnelly*, 8 *Conn. Rep.* 623. *Kane v. Whittick*, 8 *Wendell's Rep.* 219.

IN ERROR.

ALBANY,  
February, 1816.GELSTON  
v.  
HOTT.

for a long space of time, and converting and disposing thereof to their own use, whereby he was prevented from conveying the \*said goods, and lost the profit which would have accrued therefrom. 5. For seizing and taking possession of divers goods and chattels of the plaintiff, that is to say, a ship called the *American Eagle*, together with, &c., (as in the second count,) and continuing in the possession of the said goods and chattels, and taking and carrying them away. The defendants below pleaded the general issue, and two special pleas, in bar, alleging the goods, &c., mentioned in the several counts of the declaration, to be the same, and justifying the trespass; for which, together with the proceedings on the trial in the Court below, see *ante*, pp. 141—144.

On the cause coming on to be argued in this Court, the reasons for the judgment of the Court below were assigned by Mr. Justice SPENCER. (See *ante*, p. 150—156—7.)

*H. Bleeker*, for the plaintiffs in error. In discussing this case, I shall consider, in the first place, the correctness of the judgment given by the Supreme Court on the demurrer to the second and third pleas of the defendants below, and shall then proceed to the examination of the questions arising on the bill of exceptions.

The Supreme Court erred in the judgment which they gave on the demurrer to the second plea. That plea is good; it states that the vessel was to be employed in the service of *Petion*, one foreign power, against *Christophe*, another foreign power, then at peace with the *United States*; and this was sufficient; it was unnecessary for us to allege that *Christophe* and *Petion* were independent states. The act of congress† speaks merely of foreign princes and states; and whether one or both be independent or not, is no ingredient of the offence. That *Petion* and *Christophe* were foreign princes and states, the plaintiff below admitted by his demurrer: if he intended to avoid the consequences of such an admission, his proper course would have been to have replied, denying that they were foreign states recognized by this government, which would have imposed upon us the necessity of proving them such; and we were not bound to set forth the history of *St. Domingo* in our plea. But, as the pleadings now stand, our justification is sufficient, and we are entitled to judgment upon this plea. It may be said, that it contains double matter, to wit, the *instructions of the president*: on that we do not rely as a justification; but if the plaintiff below \*intended to except, on the ground of duplicity, he should have demurred specially. The third plea must, also, be good, upon this demurrer: the same answer is given to the objection of duplicity in this plea as in the last. If the state, or prince, be imperfectly described, it is matter of form only, and the plaintiff below should have demurred specially on that account. It is, at least, a good title defectively set forth, and the

† Act June 5th,  
1794. c. 3.

pleading is sufficient in substance; the facts of it are confessed by the demurrer.†

Next, as to the *bills of exceptions*. The plaintiff below did not show a sufficient possession of the vessel to enable him to maintain this action; he was a mere bailee, not answerable to the owner, whoever he was,‡ and the acquittal in the District Court, which decided nothing as to title, gave him no other or better title than he had before. The motion for a nonsuit, therefore, ought not to have been overruled.

The evidence offered by the defendants below ought to have been received, and the Supreme Court erred in deciding that all defence was precluded by the decision of the District Court.

A judgment or decree is binding only upon parties or privies. The plaintiffs in error were not parties to the proceedings in the District Court; for those proceedings were not carried on in their names, nor were they interested therein in any way; hence the injustice of their being precluded by a decision which they had no opportunity to controvert. The proceedings in the District Court were instituted against the vessel, in the name and on the behalf of the *United States*. The plaintiffs in error were merely agents authorized by the government to seize the vessel, and after seizure, their power and interest ceased, and passed into the hands of the district attorney, who was the authorized agent to prosecute;§ and ought they to be punished for the default of the district attorney in not making out the forfeiture?

It will be said that this was a decree *in rem*, and, therefore, binding upon all the world; but proceedings *in rem* can only have that effect (if in any case) when they terminate in a condemnation: an acquittal of the property is not conclusive.|| A decree of an ecclesiastical Court against a marriage is not *res judicata*; and, there, every person who is interested can make himself a party while the cause is pending, and before it is concluded.¶ With us, a decree *in rem* is not invested with that binding efficacy contended for on the other side; the subject is \*always open to examination: such was the doctrine of this Court when it decided that the decree of a foreign prize Court, condemning a vessel as belligerent property, was but *prima facie* evidence of a breach of the warranty of neutrality, in an action between insurer and insured.†† This decision places us upon open and elevated ground: it relieves us from the necessity of sheltering ourselves under the distinction taken in the *English* books between sentences of acquittal and condemnation: it shows that no decree whatever can operate upon the rights of strangers. And why should the sentence of the District Court be an exception to the general rule? That Court is no more competent to decide on the legality of a seizure than the Supreme Court. A judgment in a criminal case is not evidence in a civil action, because it is *res inter alios acta*. The judgments of foreign Courts, or of the Courts of other states, may be re-examined in actions here, between the same parties;

IN ERROR.

ALBANY,  
February, 1816.

GELSTON  
v.  
HOYT.

† 2 H. Bl. Rep.  
261. Tidd's Pr.  
647, 648, 649.  
Com. Dig.  
Pleader, (Q. 7.)

‡ Bac. Abr.  
Trespass, (C  
2.)

§ 3 L. U. S.  
279. 1 L. U. S.  
74. 1 Grayd.  
Dig. 196. 251.

|| Peake's Ev.  
29. Bull. N. P.  
245. 5 Term  
Rep. 255

¶ 2 Wils. 124.  
Harg. Tracts.  
470. 4 Co. 29. a.  
[ \* 564 ]

†† 2 Johns. Cas.  
451. S. C. 2  
Caines's Cas  
217.

IN ERROR.ALBANY,  
February, 1816.GELSTON  
v.  
HOTT.† *Peake's Ec.*  
26. *Gilb. Ec.*  
22. *Bull. N. P.*  
232.† *Ambt.* 756.  
1 *State Trials*,  
217. 219. *Ld.*  
*Thurlow's Ar-*  
*gument, Run-*  
*ing Eject.* 361.§ 1 *Lev.* 235.  
† *W. Black.*  
*Rep.* 977.

and the District Court, as regards us, is not a domestic Court, for it is the Court of another government. A decision of this Court, or of the Supreme Court, is not binding upon persons not parties or privies to it; it is not *res judicata* in an action between strangers;† and he who cannot come in as a party to the proceedings, and defend, or enter an appeal from the decision, is a stranger.‡ In an action by an executrix, it was held that the defendant was estopped by the probate from proving the will forged; and why? Because he might have appealed from the decision of the ordinary.§ The case of *Scott v. Sherman*,|| relied upon by the Court below, is inapplicable: there a condemnation in the exchequer was held conclusive; in our case there was an acquittal; but it has been sufficiently shown, that, whether the property were acquitted or condemned, the sentence would be equally inconclusive, as well because proceedings *in rem* have not, in fact, the uncontrollable power attributed to them, as because the plaintiffs in error cannot be bound by proceedings to which they were not parties; in which they could not have interposed nor asserted a claim, and from which they could have prosecuted no appeal.

Next, we contend, that the facts offered to be proved by the defendant below, had they been admitted, were sufficient to establish his defence; and in this point are involved the real merits of the case.

[\* 565]

*Petion* and *Christophe* were princes and states, within the \*meaning and policy of the act of congress, which was never intended to be confined to *legitimate* princes. They are princes and states *de facto*; they and their predecessors have existed as such ever since the year 1791; they have asserted and possessed all the rights of sovereignty, and have exercised without control, and at length without opposition, the power of self-government. The dominion of either of them is, in the words of the definition which *Vattel* gives of a nation or state,† “a body politic, or a society of men united together to promote their mutual safety and advantage by means of their union.” Such a union, according to that writer, constitutes a state. A public authority, or, in other words, a sovereignty, subsists among them, “to order and direct what ought to be done by each member, in relation to the end of the association:” to this sovereignty every member is subjected, “in every thing that relates to the common welfare.” The public authority or sovereignty “especially belongs to the body politic, or the state;”‡ wherever that authority is found, there is a nation, or state: the two ideas of sovereign power and national existence are coextensive and inseparable: they are convertible terms. *Petion* and *Christophe*, or the governments of which they are respectively the heads, exercise the sovereignty according to their respective constitutions. How, then, can it be said that these sovereignties are not bodies politic, or states?

When the plaintiffs in error have shown that *Petion* and

*Christophe*, or the governments of which they are the heads, assuming and exercising, as they do, all the rights of sovereignty, are foreign princes and states, they have made out a complete and perfect justification, and bring themselves within the letter of the act of congress. The same question arises here as on the demurrer to our second plea; and if it were not necessary for us, in pleading our justification, to allege, that they were independent, neither was it necessary in making out our defence by evidence. But we are not unwilling to meet the subject in the point of view which is deemed by the adverse party the most favorable to themselves.

A recognition, by one state, of the superiority of another, does not destroy the independence of the former. One state may do homage to another as its feudal superior, or may pay tribute to a foreign power; but the homage or tribute merely diminishes its dignity, and still suffers its independence to remain entire.†

\*But the governments of *St. Domingo* have not, in the slightest degree, acknowledged themselves to be dependent on the crown of *France*. They have asserted and maintained their independence; and whatever claim of supremacy the government of *France* may have made, it has never been able, effectually, to enforce it, and the revolted colonies have uniformly resisted it. The mere circumstance of their revolting, and going to war with their former sovereign, renders them an independent nation. "A civil war," says *Vattel*,‡ "breaks the bands of society and government, or at least it suspends their force and effect; it produces in the nation two independent parties, considering each other as enemies, and acknowledging no common judge; therefore, of necessity, these two parties must, at least for a time, be considered as forming two separate bodies, two distinct people. Though one of them may be in the wrong in breaking the continuity of the state, to rise up against lawful authority, they are not the less divided in fact. Besides, who shall judge them? who shall pronounce on which side the right or the wrong lies? On earth, they have no common superior. Thus, they are in the case of two nations, who, having a dispute which they cannot adjust, are compelled to decide it by force of arms." The laws and usages of war, as recognized by civilized nations, must be practised by them towards one another. "When a nation becomes divided into two parties," says the same author,§ "absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties is the same, in every respect, as a public war between two different nations." Speaking of the conduct which foreign nations are to pursue, in regard to the contending parties, *Vattel*|| observes, "It is not for them to judge between contending citizens, nor between the prince and his subjects: to them the two parties are equally foreigners, equally independent of their authority." The law of nations, then, evinced as it is by the deliberate opinion of one of the most

IN ERROR.

ALBANY,  
February, 1819.GRIFFIN  
V.  
HARRIS.† *B. 1. c. 1.*  
*s. 7, 8.*  
[ \* 566 ]‡ *B. 3. c. 18.*  
*s. 293.*§ *Id. s. 292.*|| *Id. s. 296.*

## IN ERROR

ALBANY,  
February, 1816.

GELSTON

v.  
HOYT.† 4 Bl. Com.  
67.† Law of Na-  
tions, 80, 81.

[ \* 567 ]

§ Edw. Adm.  
Rep. 1.

authoritative writers upon that branch of jurisprudence, has decided the question in our favor; and to that decision this Court is bound to conform its judgment; for "the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."† *Martens*‡ speaks expressly to the same effect. He puts this question: "What is the conduct to be observed by a foreign power when "a province, or territory, subjected to another state, refuses obedience to it, and endeavors to render itself independent?" His answer is, "A foreign nation, not under any obligation to interfere, does not appear to violate its perfect obligations, nor to deviate from the principles of neutrality, if (in adhering to the possession without examining into its legality) it treats as sovereign him who is actually on the throne, and as an independent nation, people who have declared, and still maintain themselves independent." If the government of the *United States* has, in any manner, or in any one instance, recognized the governments of *St. Domingo* as foreign states, it is sufficient for our defence.§ The record admitted such a recognition, when the defendant in error demurred to a plea justifying the seizure under the orders of the government of the *United States*. The giving such orders was an implied admission, by the executive, of that fact.

But if the evidence offered by us, at the trial, was not a sufficient defence, still it was admissible in mitigation of damages. The damages given by the jury were enormous, and treble the valuation which the plaintiff himself put upon the vessel, (by which he ought to be concluded,) when he had her appraised at 35,000 dollars.

The record of the judgment of the Court below is not made up according to the established forms of law. The bill of exceptions is inserted in the body of the record, and there is no other *postea*, or statement of the proceedings at the sittings, where the cause was tried, than such as is contained in the bill of exceptions.

*Van Buren*, (attorney-general,) and *T. A. Emmet*, contra. The plaintiffs in error did not choose to argue the demurrer in the Court below, and, therefore, they ought to be precluded from raising any question upon it in this Court; for, if such a course be sanctioned, it would have the effect of depriving the plaintiff below of the benefit of the permission which the Supreme Court would have granted him, to withdraw his demurrer and reply.

But the second and third pleas are palpably bad; the defendants below have not averred themselves to be revenue officers, and so have shown no right to make the seizure. The directions of the president can be no justification; for the government \*must act by judicial process, unless where a particular power is

[ \* 568 ]



given by statute. The 7th section of the act, under which the seizure in this case was alleged to have been made, gives the president power, "in every case in which a vessel shall be fitted out and armed, or attempted so to be fitted out or armed," contrary to the provisions of that act, "to employ such part of the land or naval forces of the *United States*, or the militia thereof, as shall be judged necessary for the purpose of taking possession of, and detaining, any such ship or vessel." The present case has not been brought within that section; the defendants below have not averred that any land or naval force was employed. The power there given is a limited power, and should be specially stated.† These pleas are also bad, because they do not answer the whole of the declaration; they do not meet the charge of *converting and disposing to the defendant's use*, and they have thus rendered themselves trespassers *ab initio*; for, by converting the vessel to their own use, although the original taking might have been lawful, they become trespassers *ab initio*.‡

These pleas, too, are substantially bad, in presenting a fact which cannot be tried by a jury. What is, or is not, a foreign state, is a question of public law for the decision of the Court, and to be determined by the solemn acts and recognitions of the government.§ The fact, then, that *Petion* and *Christophe* were states, is not admitted by the demurrer, for it is a matter of law; and a demurrer admits only such facts as are triable by a jury. The plaintiffs in error come with a very ill grace to assert the independence of the island of *Hayti*, when, in 1809, two libels were depending, on their own prosecution, in the District Court of this district, against goods alleged to be of the "growth, produce, and manufacture of a colony or dependency of *France*, to wit, *St. Domingo*," and seized, as imported, or intended to be imported, into the *United States*, in contravention of the act of congress, for prohibiting commercial intercourse between the *United States*, and *Great Britain* and *France*.|| We repeat, that a demurrer admits only facts well pleaded, which are thereby withdrawn from the jury; but it admits no matter of judicial cognizance.¶

The third plea is bad, because too general and vague, in not setting forth the foreign states, in the service of one of which \*the vessel was to be employed against the other. The justification of the defendants consisted in a criminal charge against the plaintiff below; the utmost certainty, therefore, is required in stating it; but to this allegation it would be impossible for the plaintiff to know what to reply.††

The defendants below had but two pleas in bar of our action; they might have pleaded that the vessel had been condemned as forfeited, or that she had been acquitted, and a certificate of probable cause granted them by the judge. But, by their present pleas, they have attempted to draw to the jurisdiction of the state Courts, a cause of which they can have no cogni-

IN ERROR.

ALB. NY,  
February, 1816.GELSTON  
V.  
HOTT.† 1 Esp. Dig.  
336.‡ Com. Dig.  
Trespass, (C.  
2.) Distress,  
(D. 6.) 8 Co.  
146. 2 Rol. Abr.  
561. l. 10. 562.  
l. 15. 20. 25. 3  
Wils. 20. 1  
Term Rep. 12.§ Edw. Adm.  
Rep. 1. 4  
Cranch, 272.|| The case of  
the British  
schooner *Janice*,  
and of the Swe-  
dish schooner  
*Lynx*. In both  
cases the forfeit-  
ures were remit-  
ted by the secre-  
tary of the treas-  
ury.

[\* 569]

† 1 Saund. 49.  
March. pl. 420  
Lutw. 16. Lutw.  
421, 422. 2 Le-  
on. 34. 3 Leon.  
3. 1 Show. 6  
Poph. 209. Sav.  
88. 2 Ro. 22. 1  
Leon. 80.†† Str. 999.  
Burr. Rep.  
2451. Com.  
Dig. Pleader,  
(C. 76.) 2  
Saund. 379. 3  
Term Rep. 626.

**IN ERROR.**ALBANY,  
February, 1816.

GELSTON

v.

HOYT.

† 2 H. Bl.  
Rep. 145.‡ 5 Johns.  
Rep. 101.

zance. In *England*, in an action of dower, on a plea of *ne unques accouple*, the question of *loyal matrimonie*, if contracted within the kingdom, is always sent to be tried by the bishop, in whose diocese the espousals are alleged to have been had;† and thus, in this, and a variety of other cases, the Courts of law take particular care not to intrench upon Courts of special jurisdiction. In an action of trespass, *de bonis asportatis*, brought while a suit is depending for the forfeiture, the defendant may plead the pendency of the proceedings in the District Court, in abatement.‡

[During the argument, *Baldwin*, for the plaintiffs in error, observed, that the first count was bad, the verdict being general, for not specifying what goods and chattels; and that the fourth count was equally bad for the same cause, though not so palpably.]

It is in vain that the counsel, on the opposite side, endeavor to avoid the effect of their own mispleading, by fixing the first error upon the plaintiff. These objections to the declaration were not made in the Court below, nor assigned for error, and it is too late to start them here. But these counts, if informal, are cured by the defendant's pleas in bar, which identify the goods, and show what the cargo consisted of.§ If not aided by the bar, they are cured by the verdict, and, at the utmost, set forth a good title in a defective manner, and the circumstances omitted must have been proved on the trial, to have entitled the plaintiffs to a verdict.|| It is only insufficient pleading, and that is within the statute of jeofails. The defendants below ought to have taken advantage of the error, in arrest of judgment, and the Court below would have allowed us to have applied our verdict to the good counts;¶ and this Court will allow \*the amendment to be made, in the same manner as may be done in the Court below.†† There can be no difficulty, in this case, in making the amendment, for all the facts are set forth in the bill of exceptions, and make part of the record. It is denied that one bad count will vitiate a general verdict.

To proceed to the consideration of the bill of exceptions. The application for nonsuit was properly overruled at the trial; sufficient evidence of property had been given; it was enough that we had the possession in order to maintain an action of trespass.‡‡ The plaintiff afterwards proved the sale and delivery of the ship to himself, and thus established his right of property.

The main point in this case is, the effect of the decision of the District Court, which we contend is conclusive. For it would be monstrous that the acquittal should be conclusive on the District Court, which has exclusive jurisdiction of the subject matter, and yet not binding, in a collateral action, on a Court which has no jurisdiction of it at all. The decision of every Court of exclusive jurisdiction is binding upon all others. The Court of Chancery has exclusive power to decree a divorce. If, then, a woman brings a personal action at law, in her own name, and

§ Com. Dig.  
Pleader, (C. 85.)  
Cro. Car. 385.  
Latw. 1492.  
Foot. 377.  
Lutch. 487. Dy-  
er, 15 pl. 78.

¶ 1 Johns.  
Rep. 462. 2  
Johns. Rep. 561.  
5 Co. 34. 2

[\* 570]  
Saund. 74. n. 1  
Cro. Jac. 435.  
Com. Dig.  
Pleader, (C. 87.)  
Cro. Eliz. 276.

¶ 2 Johns.  
Cas. 17. 1  
Johns. Rep. 505.  
Doug. 376. 3  
Term Rep. 559.

†† 4 Johns. Rep.  
499. 7 Johns.  
Rep. 468.

‡‡ 4 Term Rep.  
489. 6 Johns.  
Rep. 195. 8  
Johns. Rep. 432.

2 Saund. 47. 1  
Chitty's pl. 168.  
171. 2 Ro. Abr.  
551. l. 31. 569.  
l. 22. Brook.  
Trespass, 67.

the defendant pleads the coverture of the plaintiff, who replies the divorce, the proceedings and decree of the Court of Chancery are complete and perfect evidence, in support of the replication, and they cannot be opened and examined by the Court of law. So, the decision of the Court of Probates upon a will of chattels, is conclusive. In like manner, the District Court has exclusive jurisdiction in cases of forfeitures under the laws of the *United States*, which is final, unless appealed from; and even had our Courts concurrent jurisdiction, still the decree of that Court must be final. On a former occasion, in this very cause, the defendants' counsel, (*Baldwin*), on moving the Supreme Court for an imparlance, until the libel in the District Court was determined, admitted this very position; and urged, as a reason for granting the rule, that if the Supreme Court could entertain this cause, and suffer it to proceed, it would, in effect, have a control on the District Court of the *United States*, "which has exclusive jurisdiction in all such cases."<sup>†</sup>

Again; every judgment not reversed is binding upon parties and privies. In suits *in rem*, in the admiralty, every person is deemed a party. Every person having a qualified interest, can \*interpose his claim; and the plaintiffs in error were, strictly and peculiarly, privies to the proceedings in the District Court; and although they might not be permitted to appeal, yet, as privies, they were bound by them. That they were privies, there can be no doubt; they made the seizure as agents of the government of the *United States*; as officers of the revenue, they were the lawful agents particularly designated for that purpose. That they were informers, there can be no doubt; that is to be inferred from the libel and proceedings thereon; the libel states, that *Schenck* made the seizure; and why was the seizure made? Because, as informers, they were entitled to a moiety of the forfeiture. But, admitting that the plaintiffs in error were neither parties nor privies to the decree of the District Court, still, as it was a decree *in rem*, they are bound by it. A decision *in rem*, in a Court of record of competent, and, especially, of exclusive jurisdiction, is binding upon strangers.<sup>‡</sup> The Court which made the decision is bound by it; still more are other Courts and strangers.

The distinction attempted to be taken on the other side, between sentences of condemnation and of acquittal, has no existence; it is repelled by the authorities which we cite.<sup>§</sup> Such a distinction would act oppressively and unjustly upon the party whose property had been seized. He might continually be harassed with new seizures and prosecutions. If a sentence of acquittal be not conclusive, why does the statute authorize the judge to give a certificate of probable cause? There would be no necessity for vesting this enormous power in the hands of a single judge, if the circumstances which would render the granting the certificate proper might be adduced as a defence in another Court, in a collateral action for the trespass. It is only

IN ERROR  
ALBANY,  
February, 1816.

GELSTON  
v.  
HOYT.

† 8 Johns.  
Rep. 180.

[ \* 571 ]

‡ W. Bl. Rep.  
977. Amb. 756.  
Peake's Ev. 73,  
79. Harg. Law  
Tracts, 451.  
Bull. N. P. 244,  
245. 2 Wils.  
124. 128. 5  
Term Rep. 256.  
Brook's Abr.  
Estoppel, pl. 2  
Fitzh. Abr. Es  
toppel, pl. 28.  
§ 12 Vin. Abr.  
94. 5 Term Rep.  
255

**IN ERROR.**ALBANY  
February, 1816.

GELSTON

v.

HOYT.

† *Running*,  
Eject. 364. 2  
Wils. 124. 128.  
Bull. N. P. 245.

in criminal cases that the distinction between a condemnation and an acquittal subsists; never in civil cases. In a criminal case, the acquittal ascertains no fact, and is not even conclusive upon the Court which pronounces it.† The doctrine in the case of the *Dutchess of Kingston* applies only to criminal prosecutions.

Nor have the cases, in relation to the sentences of foreign prize Courts, any application here. Those decisions we cannot, and ought not, attempt to shake; but the District Court is not a foreign Court; it is a Court established under the authority of the constitution of the *United States*, which is the supreme law of the land.

[\*572]

\*Admitting that this Court is authorized to open and re-examine the decision of the District Court, and treat the case as if it were not a *res judicata*, still, the plaintiffs in error must fail. It is for government alone to decide whether the states of *Hayti* are independent, within the meaning of the act of congress; certainly not for a jury. The recognition of a revolted and rebellious colony, as a nation, is a matter of high expediency, of public policy, connected with the law of nations, and of which Courts and juries are incompetent to judge. Considerations of foreign intercourse, of peace and war, are involved, and if Courts usurp the power of deciding such questions, they may involve the country in hostilities. Suppose a vessel had been fitted out in the ports of the *United States* by *Bonaparte*, to suppress the insurrection in *Hayti*, and had been seized under this act, would it not have been a just cause of complaint on the part of *France*? It would be usurpation on the executive and legislative functions, for Courts of justice to consider a nation, or a prince, as independent before government has recognized their independence, by some law or treaty, or other public formal act. These are the true and only legal evidence of a recognition by the government of the *United States* of a new-created foreign power.‡ It is absurd to say, that the order of the president to seize, mentioned in the pleadings, was such a recognition; if it were to be so, it should previously have been made known, otherwise we should be punished by an *ex post facto* law; but it does not appear, from the bill of exceptions, that any order was offered to be given in evidence. The effect of such an order was discussed while examining the pleas of the defendants below.

† 4 *Cranch*,  
272. *Edw. Adm.*  
*Rep* 1.

The views, however, of the government have been disclosed; their intention has been declared to be, that they would not come in collision with any claims of *France* to the sovereignty of the revolted colonies in *St. Domingo*. By the act of February 28, 1806, § "all commercial intercourse between any person, or persons, resident within the *United States*, and any person, or persons, resident within any part of the island of *St. Domingo*, not in possession, or under the acknowledged government of *France*, shall be, and is prohibited." This was only a ten

porary act, yet it serves as an exposition of the policy of our government, which Courts are bound not to counteract. Courts, both in *Great Britain* and in this country, have decided, that those colonies were not independent nations.†

\*The record was properly made up, and if there be any informality in it, this Court will amend and overlook it.‡

*Baldwin*, in reply, insisted, that this Court was in duty bound to examine the points arising on the demurrer, although he refused to argue them in the Supreme Court.

The defendant in error might have received the ship at any time, upon giving security for the appraised value: the appraisal was made at 35,000 dollars, and never excepted to, and yet he does not bond the ship. How could she be worth 35,000 dollars in *April*, 1806, and 107,000 dollars a short time before?

[*The Chancellor*. The question of damages cannot be argued here.]

The second plea is good, because *Petion* and *Christophe* are to be regarded here as princes, or states, within the meaning of the act of congress; and it shows that the plaintiff had no right of action; for, the vessel being seized as forfeited, his property was immediately divested, and he could not maintain an action of trespass;§ at least, not until the property was revested in him by the acquittal. The demurrer admits the allegation in the plea, that *Petion* and *Christophe* were foreign states, to be true.

Nations acquire independence in two ways: 1. By the consent of the parent state; 2. By force. Whether independent or not, is a matter of fact: a recognition of their independence by the government must also be a matter of fact. Suppose that *Bonaparte* had relinquished his claim to the island of *Hayti*, would that have been matter of law? In the case of *Rose v. Himely*,|| so much insisted upon by the other side, the question of the independence of *Hayti* did not arise, and was not decided in that case. *St. Domingo* was then, at least in part, in the possession of *France*; but *France* has since evacuated the whole island.

We were not bound to deny the carrying away, and disposing of the property; it was unnecessary to have stated it in the count, for it was mere matter of aggravation; if the plaintiff below intended to have taken advantage of it, and rendered the defendants trespassers, *ab initio*, he should have shown the special matter in a new assignment.π But his proper course was to have denied the fact that the governments of *Petion* and \**Christophe* were independent states, and so have had that matter tried. It is, however, unnecessary for us to defend our pleas; for, the first fault in pleading being on their side, we are entitled to judgment.†† The third plea is also good, on general demurrer; the plaintiff below should have replied to it, or de-

IN ERROR.

ALBANY,  
February, 1816.

GELSTON

v.  
HOYT.

[ \* 573 ]

† 4 Cranch,  
272. Edw. Adm.  
Rep. 1.

‡ Bull. N. P.  
317. 2 Esp.  
Dig. 591. 1 R.  
L. 319. 1 L. N.  
Y. Kent &  
Radcliff's Ed.  
129. 4 Johns.  
Rep. 499.

§ 5 Term  
Rep. 112.

|| 4 Cranch  
241.

π 3 Term Rep  
292.

[ \* 574 ]

†† 1 Chitty  
Pl. 647.

IN ERROR.

ALBANY,  
February, 1816.

GELSTON

v.

HOYT.

† 1 Term Rep.  
748.† 11 Johns.  
Rep. 460.

murred specially.† That plea was drawn to test the right of the defendants below, under the 7th section of the act, which, although it speaks of employing land and naval forces, yet implies a seizure by civil and pacific means—by means of the revenue officers.

We are not bound by the decision of the District Court: we were not privies to it. Privies are persons who, by reason of blood or estate, come into the place of a party to the judgment; such are heirs, executors, and devisees, and they may appeal; but we had no right to appeal, and therefore, are not privies. The mere seizure of the ship gave no right to the forfeiture; and, in that point of view, we are not privies. We insist, also, that there is a substantial distinction between an acquittal and a condemnation. [Here the counsel examined the cases which have already been cited to this point.] Suppose the plaintiff below had brought his action of trespass to trial, and failed, before the vessel was libelled in the District Court, could the plaintiffs in error, or the *United States*, have shown that judgment as proof of the forfeiture? If not, the parties do not stand upon equal ground. Besides, the Courts of the *United States* are not domestic Courts. The evidence offered should, then, have been admitted; because, 1. The decree of the District Court was not conclusive; and, 2. Because the chiefs of *St. Domingo* are independent princes, or states, within the act of congress. And the evidence was admissible in mitigation of damages, although the plaintiff below disclaimed to charge the defendants with malice.

THE CHANCELLOR. The suit in the Supreme Court between these parties was an action of trespass, in which *Hoyt* declared against *Gelston* and *Schenck*, for seizing, taking, and carrying away his ship, called the *American Eagle*. To this charge the defendants plead, not only the general issue, but two special pleas in bar; and to these pleas there was a general demurrer and joinder, and judgment for the plaintiff.

[ \* 575 ]

On the trial of the general issue, *Hoyt* gave in evidence, that, \*at the time of the seizure of the said ship, she was in his actual, full, and peaceable possession; and that, upon being seized, she was libelled in the District Court of *New-York*, on a charge of being fitted out, armed and equipped, with intent to be employed in the service of *Petion*, who had under his government part of the island of *St. Domingo*, against *Christophe*, who had under his government another part of the said island. That, on a trial in the District Court, under that charge, the libel was dismissed, and the ship decreed to be restored to *Hoyt*, the claimant.

On this evidence, a motion was made for a nonsuit, and overruled.

The plaintiff, *Hoyt*, afterwards, in the progress of the trial proved his purchase of the ship of the owner; and the defend  
472

ants offered in evidence, by way of defence, or in mitigation of damages, under the notice of special matter, subjoined to the general issue, that the ship, with her equipment, was fitted out, and armed at *New-York*, on the 1st of *July*, 1810, to be employed in the service of *Petion*, as aforesaid; and that the defendants, as being, respectively, collector and surveyor of the port of *New-York*, seized the ship. This evidence was overruled as a justification; and as the plaintiff thereupon admitted that the defendants had not been influenced by any malicious motives, and had not acted with any view or design of oppressing or injuring the plaintiff, it was overruled, also, in mitigation of damages; for, after that admission, the plaintiff could recover only the actual damages sustained; and with that direction the judge left the cause to the jury.

To all these decisions of the judge, at the trial, exceptions were taken, and upon that bill of exceptions, the cause was brought into this Court.

The first error assigned on the part of the plaintiffs in error, is, that the matters contained in the 2d and 3d pleas in bar, and which appear upon the record, amounted, in law, to a justification, and that the judgment on the demurrer ought to have been in favor of those pleas. As connected with this point, it is also urged, that the first and fourth counts in the declaration are bad, and the defects fatal, after a general verdict upon the declaration at large.

The judges of the Supreme Court have not assigned reasons for the judgment which they pronounced on the demurrer; because, \*as was stated by Mr. Justice *Spencer*, in behalf of that Court, "when the cause was called, (meaning the issue joined on the demurrer,) the defendant's counsel appeared, and declined to argue; whereupon judgment was given for the plaintiffs, on the defendant's counsel declining the argument."

Are, then, the plaintiffs in error to be permitted to come here and argue the questions arising upon the demurrer, when they declined the argument in the Court below? This is an important question, and it meets us in the very threshold of the case.

I am of opinion that they are precluded, and for the following reasons:—

1. In the first place, it is an unfair pleading, for it takes from the party demurring an advantage which he would have been entitled to in the Supreme Court, if the inclination of that Court had been against him, of withdrawing his demurrer and replying to the pleas. I presume this Court cannot grant such a favor. If it can, the favor would be overloaded with costs. I know of no such precedent. It is not a case of amendment, and not within the ordinary province of a Court merely of review. A party acts against good conscience if he will not come forward and disclose his reasons, when called upon by the proper tribunal, but reserves himself for another Court, and for the

IN ERROR.

ALBANY,  
February, 1816.GELSTON  
V.  
HOTT.

[\* 576]

IN ERROR.ALBANY,  
February, 1816.GELSTON  
v.  
HOTT.

cold, hard purpose of accumulating costs, or of depriving his adversary of the opportunity of correcting his error.

2. This point is within the reason of the decision of this Court, at the last session, in the case of *Sands v. Hildreth*. (12 *Johns. Rep.* 493.) (a) There the appeal was dismissed because the appellant did not appear in the Court of Chancery after the cause had been regularly set down for hearing, on due notice, but voluntarily suffered a decree to pass against him by default. That decision was not founded on any new principle, and it equally applies to this case. There is the same rule in the *English* house of lords; and in *Dean v. Abel*, (*Dickens's Rep.* 287.) an appeal was dismissed without going into the merits, because the party, at the hearing in chancery, had made default, and suffered a decree to be pronounced against him. So, again, in a late case, (2 *Schoale & Lefroy*, 712.) Lord Eldon said it was well known as an established rule, that no point not made in the Court below, could be made on appeal to the house of lords.

[\* 577]

3. This is a just and wise rule; for the very theory and constitution of a Court of appellate jurisdiction only, is the correction \*of errors which a Court below may have committed; and a Court below cannot be said to have committed an error when their judgment was never called into exercise, and the point of law was never taken into consideration, but was abandoned, by the acquiescence or default of the party who raised it. To assume the discussion and consideration of a matter of law, which the party would not discuss in the Supreme Court, and which that Court, therefore, did not consider, is to assume, in effect, original jurisdiction. It is impossible to calculate all the mischiefs to which such a course of proceeding would lead. Either party would then be able, in every case, to bring his question of law, as new, undiscussed points, before this Court. This would, indeed, be leaving the Supreme Court, with its plenitude of power, to enjoy the *otium cum dignitate* in harmless repose; but this was never the intention of the constitution. That Court was created, with all its competence and organs, to be the great trustee, the tutelary guardian of the vast body of the common law. What good motive can a party have, who will not argue a law question in the Supreme Court, but insists on bringing it here to be exclusively discussed? It is according to the genius of our whole judicial establishment, that the Court which originally decides a cause, should be subject to review by another Court; but on the plan pursued in the present case, this Court, though only a Court of review, will be the first and the last, originally, and finally, to decide the law. Why should not a party be obliged to obtain the opinion of the Supreme Court before he comes here? How can he know but that such

(a) *Colden v. Knickerbacker*, 2 *Conn. Rep.* 31.



opinion might have saved him the expense, and us the trouble, of the writ of error? It is certainly as much as we can do well, and I fear more than we can do with despatch, to hear and decide questions of law after they have been maturely considered in the Supreme Court, and with the assistance of all the light and knowledge which can be imparted to the subject, from the researches of that tribunal.

IN ERROR

ALBANY,  
February, 1816.GELSTON  
v.  
HOYT.

4. But a still more decisive objection to our taking into consideration a question on demurrer in the Court below, and there refused to be argued, is to be drawn from that article in the constitution which provides for the institution of this Court. It declares, that "if a cause shall be brought up by writ of error on a question of law on a judgment in the Supreme Court, the judges of the Court shall assign the reasons of such their judgment." In a case, then, in which the opinion of the Supreme Court was never required, or taken, no reasons can be assigned, and it is not a case for a writ of error within the purview of the constitution. This Court is entitled, as *of right*, in all cases of error, to the aid of those reasons; and if the party will not condescend to ask for the opinion of the Supreme Court before he comes here, he cannot justly complain if we refuse to hear him. It will be imputable to his own fault or folly; and he ought not to be permitted to deprive the opposite party, and this Court also, of the benefit of that investigation which the Supreme Court is always ready and able to give to every question properly submitted to it.

[\* 578]

For these reasons, I have thought it to be my duty to abstain from any consideration of the first point, in the plaintiff's case, respecting the demurrer to the second and third pleas. The same objection applies to a new point suddenly started in the midst of the argument here, and never heard of in the Court below, and which was, that the first and fourth counts in the declaration were bad. If I had chosen to have gone into the discussion, I apprehended I should have no great difficulty; for the defects, if any, in the counts, were supplied and cured by the pleas in bar, which identified and made certain the goods mentioned in the first and fourth counts. The matters in the special pleas were the same, in substance, with the matters contained in the notice to the general issue; so that the plaintiffs in error have, in fact, lost nothing by the course they took, as every benefit of the special pleas was reserved to them by the notice, and the evidence offered under it. That evidence involved the whole merits of the case, and to those merits I now proceed.

*Hoyt* was in the actual and peaceable possession of the vessel, when the seizure was made; and there can be no doubt, from that fact, that he was entitled to maintain the action of trespass, and that the motion at the trial for a nonsuit was properly overruled. It would be a waste of time to cite authorities

## IN ERROR.

ALBANY.  
February, 1816.GELSTON  
v.  
HOTT.

[ \* 579 ]

to so plain and well-settled a proposition. The great point is, whether the matter offered in evidence by the defendants ought to have been received. The defendants offered to prove, that the ship was fitted out, and equipped in the port of *New-York*, with intent to be employed in the service of *Petion* against *Christophe*, and that she was seized by the defendants, as collector and surveyor of the customs, under the act of congress. \*When this evidence was offered, the plaintiff had already proved that the seizure was made by *Schenck*, under the directions of *Gelston*, and had given in evidence the proceedings in the District Court, in pursuance of that seizure, and under the very allegations set up by the defendants, and from which it appeared that the District Court had, notwithstanding, dismissed the libel and restored the vessel, with the strong opinion that there was not even reasonable cause for the seizure.

The evidence offered by the defendants below was not admissible in mitigation of damages. After the plaintiff had renounced all claim to *extra* damages, and after the judge had ruled that he was only entitled to his actual damages, the testimony, in that view, became wholly useless; for, if entitled to recover any thing, the plaintiff was, finally, entitled to recover the actual damages he had sustained, and we are bound to presume, upon the record before us, that he recovered no more. The testimony, if proper in any sense, was a complete bar to the action.

But I am of opinion that it was properly overruled; for, after the decree of acquittal in the District Court, the same question could not be tried again in the action of trespass; and the decision, that the vessel was not liable to seizure and forfeiture under the charge alleged, was binding and conclusive in the action between these parties. The officer who seizes goods on the ground of forfeiture, and causes them to be libelled and tried, has but two pleas in bar to an action by the owner; these are the judgment of the Court, if the goods be condemned, and a certificate of probable cause, if the goods be acquitted. If he can show neither, he must answer for the seizure in an action at common law.

This point was discussed at large upon the argument, and with much talent and research. I feel myself, therefore, called on to give it a more particular attention.

It may be admitted as a general principle, that the sentence of a competent Court binds only parties and privies, and does not bind strangers, who have no interest in the suit, and who could not be admitted to agitate the case, nor to bring an appeal. Lord Ch. J. *De Grey*, in delivering the opinion of the judges, on the trial of the *Dutchess of Kingston*, stated this general rule, but he said there were some exceptions to it, founded on particular reasons. It does not appear to me, however, \*that the defendants below come within the reason of the rule;

[ \* 580 ]

and it seems to be perfectly just, that the acquittal of the ship, in the District Court, on the charge of being equipped for the service of *Petion*, should, as to that charge, be binding and conclusive in the trespass suit.

I do not consider those defendants as strangers to the prosecution in the District Court. In the first place, it is to be inferred from the case, that they were the persons who "gave information of the offence," and, consequently, were the persons entitled to one half of the proceeds of the seizure and forfeiture. The statute under which the seizure was made, gives a moiety to the informer. And who, are we to presume, gave the information, in this case, to the government, and caused the prosecution to be instituted? Whom could it be but Messrs. *Gelston* and *Schenck*, who voluntarily made the seizure upon some observation or knowledge of their own? It is in proof that the ship was seized by the one, under the written directions of the other. Some person must have given information to the government; some person must have set on foot the prosecution; and, in the absence of any other proof which the defendants omitted to furnish, the necessary intendment is, that the same persons who seized the ship were the persons who gave the information. We cannot trace the information to any other source, and we are not bound to enter the land of dreams for shadowy beings, when we have before us the very persons who made the seizure, who possessed all the knowledge that the case afforded, and upon whose seizure, as the libel admits, the whole prosecution was grounded. The law looks no further than to the immediate cause of an act; *non remota, causa sed proxima spectatur*. We have a right, then, to consider *Gelston* and *Schenck* as the informers, and as being parties in interest to the prosecution carried on at their instance in the name of the *United States*.

But if they were not the informers, they were, in effect, by virtue of their office, and act of seizure, privies to the prosecution. They seized in the character of officers of the customs, and as assumed agents of the government of the *United States*. A decision against the principal binds his agent, and the agent must look to the principal for indemnity. *Scaccia*, in his book *de Sententia et Re Judicata*, in a passage cited by Mr. *Hargrave* in his *Law Tracts*, p. 483, after stating the general rule, that *\*res inter alios acta aliis nec prodest nec nocet*, gives this exception to it, *sententia lata cum eo cuius principaliter interest, et a quo alii jus habent consecutivum, facit jus quoad omnes, etiam non intervenientes et non citatos*. There is a close intimacy and sympathy, flowing from the law, between the officers of the customs and the government; and it might as well be pretended, that, if the seizure had been made by the secretary of the treasury, a decision against the *United States* would not have bound him. By the acts of congress, (*Laws of U. States*, vol. 1. 74.

IN ERROR.

ALBANY,  
February, 1816.GELSTON  
v.  
HOYT

[\* 581]

IN ERROR.

ALBANY,  
February, 1816.GELSTON  
v.  
HOYT.

vol. 4. 427. sect. 89.) all penalties and forfeitures incurred under the revenue laws are to be sued for in the name of the *United States*, by the attorney for the district; and the collector of the customs is to cause suits to be prosecuted for all forfeitures under the revenue laws, and to receive and distribute the penalties when collected. It is also made the duty (*Laws of U. States*, vol. 4. 390.) of the officers of the customs to seize all vessels liable to seizure under any revenue law. This case does not, indeed, come strictly within the provision of these laws, but it would be acting against the truth of the fact, as well as against the justice of the case, to regard these defendants as *strangers* to a prosecution carried on by the *United States* under a seizure made by them as officers of the customs. Most undoubtedly they are to be regarded as agents of the government in the whole of the transaction, and upon all the principles of justice, they ought to be concluded by a decision against that very government in whose behalf they seized, and instituted the suit. The government itself cannot be sued. There is no remedy but against its public officers. And if they, clothing themselves with the powers of the government to commit a trespass, are not to be bound by a decision against the government, and that, too, in a prosecution brought at their instigation, individuals would contend upon most unequal terms.

[ \* 582 ]

It would operate most injuriously to the plaintiff below, if the acquittal of his vessel, in the District Court, was not to be held conclusive, on the question of forfeiture, in all other Courts. Let us pursue this point to its practical consequences. Suppose the Supreme Court, in this case, had admitted, as a legal justification, the matter set up as a defence, and had held, in opposition to the decree of the District Court, that the vessel was lawfully seized, and justly liable to forfeiture under the laws of the *United States*. What then? It is certain that such a decision \*could not work a forfeiture of the ship; for no other Court but the District Court has authority to condemn. The only effect of such a decision would be to deprive *Hoyt* of his remedy for the seizure and detention of his vessel. He and his vessel are to be deemed innocent as respects the *United States*, but guilty as respects the officer who seized. His property is fairly acquitted by the only Court that has authority to try and condemn. The government in whose name, and on whose behalf, it was seized and libelled, acquiesces in the justness of the sentence, and files no appeal. But when he attempts to sue the officer who did him the injury, a state Court, which has no jurisdiction over the question of forfeiture, declares in favor of the lawfulness of the seizure, and right of forfeiture, and thus deprives him of all redress. Can it be possible that a doctrine leading to such absurd results, to such inextricable confusion, is well founded?

Without entering into a large field of inquiry, I apprehend it  
478

can be easily and satisfactorily shown that this is not the rule of law. *IN ERROR.*

The case of *Scott v. Shearman*, (2 *Wm. Black.* 977.) arose in the *English* Court of C. B. in 1775. The case was cited and relied upon in the Supreme Court. It was an action of trespass against custom-house officers for entering the plaintiff's house and seizing his goods. The defendants gave in evidence, by way of justification, a condemnation of those goods in the exchequer. The cause was twice argued, and underwent great examination. It was then contended, as it has been here, that the condemnation was only conclusive *in rem*, or on the point of forfeiture of the goods, but not in a collateral action, if the owner could prove that the goods were, in fact, not seizable, and had sued the officers seizing for damages. But the Court unanimously held, that the sentence of condemnation was conclusive upon the action, and gave judgment accordingly.

There can be no doubt that this decision is a declaration of the established *English* law, and that it was so when our constitution was made. When Lord Ch. J. *De Grey* gave to the house of lords, in the *Dutchess of Kingston's Case*, the opinion of the judges on the effect of a sentence in the ecclesiastical Courts, in bar of a criminal prosecution, he certainly did not mean to touch the authority or correctness of this decision, which he had pronounced the year before. This is still more evident when we advert to the fact that, two years after the trial of the *Dutchess of Kingston*, he said, (2 *Bl. Rep.* 1174.) the determination in this cause, that a condemnation of goods in the exchequer was conclusive against all the world, had been the uniform law for above a century. And many years afterwards, we find Lord *Kenyon* (7 *Term Rep.* 696.) declaring, that the same rule had been deemed settled in the early part of Lord *Mansfield's* time, and that he always acted upon it.

The law, then, is to be considered as settled, clearly, uniformly, and definitely, that if goods be seized by a custom-house officer, and are libelled, tried, and *condemned* in the exchequer district, or other Court having cognizance of the forfeiture, and the seizing officer be afterwards sued in trespass for taking the goods, he may plead that condemnation in bar of the action. So far we have proceeded with perfect assurance. The next question, then, is, Suppose the goods to be seized, tried, and *acquitted* in the District Court, and the officer be then sued for seizing the goods, can the officer contest the legality of the seizure over again, or cannot the owner, in his turn, set up the sentence of acquittal as a bar to that inquiry? This is the very point and pith of the controversy, and I entertain no doubt, it is equally well settled as the other; and that if the condemnation is a bar to the action on the one hand, the acquittal is a bar to the defence on the other. It would be monstrously unjust and repugnant to all principle, if the rule were not so. Ought not

ALBANY  
February, 1816.

GELSTON  
v.  
HOYT.

[ \* 583 ]

IN ERROR.

ALBANY.  
February, 1816.GELSTON  
V.  
HOYT.

[\* 584]

the parties to be placed upon equal ground? and, if the sentence of condemnation be conclusive in favor of the seizing officer, ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every man of common understanding, that the rule, to be just, should be equal and impartial in its operation. In the opinion delivered, in behalf of all the judges, in the case of the *Dutchess of Kingston*, to which I have already referred, and to which I again allude, with the more satisfaction, because it is not only of great authority, but was very much relied on by the learned counsel for the plaintiffs in error, Lord Ch. J. *De Grey* lays down this important maxim, that "the rule of evidence must be, as it is often declared to be, reciprocal, and that in all cases in which sentences favorable to the party are to be admitted as conclusive evidence for him, the sentences, if \*unfavorable, are, in like manner, conclusive evidence against him."

After a principle is so clearly laid down, and is, in itself, so eminently just, we hardly stand in need of cases to illustrate it. But we have a case, as early as 1716, before Baron *Price*, precisely to the point. (12 *Viner*, 95. A. b. 22. 1.) It was an action of trover, for a parcel of brandy which had been seized on some alleged breach of the revenue laws; and on an information in the exchequer, in the name of the attorney-general, the party and his property were acquitted. The sentence of acquittal was given in evidence, in the trover suit; and, on the other side, evidence was offered against the sentence, and to let in the parties to contest the fact of forfeiture over again, notwithstanding the trial and decision in the exchequer. But the evidence was rejected, and the decision of acquittal held binding.

I entertain no doubt, that this decision has been considered as good and settled law ever since it was made. It was cited as uncontradicted law, by Mr. Justice *Blackstone*, in the elaborate opinion he gave in the case of *Scott v. Shearman*, already referred to; and in *Cook v. Sholl*, which came before the K. B. in 1793, Lord *Kenyon* said, he conceived that the judgment of acquittal in the exchequer, being a judgment in *rem*, was conclusive in the subsequent action of trover, as to the question of the illegality of the seizure. The whole Court of K. B. were, at once, of that opinion, and so determined the cause; but, on a subsequent day, one of the counsel said that point was not so clear, for that there was a distinction as to the effect of a judgment of acquittal, or of condemnation, in the exchequer, and he referred to a passage in *Buller's N. P.* 245., in support of his distinction. But the Court never reconsidered this point, for the cause went off on other grounds.

We have, then, the decision before Baron *Price*, as long as a century ago; we have that case cited in 1775, as good law, by Sir *Wm. Blackstone*, and we have the decision of the K. B. in

1793, on the same point. In opposition to all this authority, there is nothing to be cited but a passage in *Buller's N. P.*, without any adjudged case to support it; and when we come to examine the passage, we must be satisfied it cannot have been intended to apply to a proceeding *in rem*. The reason assigned in *Buller's N. P.* why an acquittal is not conclusive in a collateral action, as well as a condemnation, is, that *an acquittal ascertains no fact as a \*conviction does*. This is the reason assigned. Thus, it is said, if a party be indicted for bigamy, and convicted, it must have been a full proof that he was twice married, and could not have been on any other ground; but if he was acquitted, it might have been because he had reason to believe his first wife was dead, though she was not dead; or it might have been for many other reasons, without supposing the second to have been a lawful marriage. All this may be true in that and like cases; but in a case in the exchequer, where the goods are themselves seized and libelled as being forfeited to the government, and which is termed a proceeding *in rem*, the question of forfeiture is the only question that can be made, and a decree of acquittal does ascertain the fact that they were not forfeited, with as much certainty as a decree of condemnation ascertains the fact that they were forfeited. Indeed, in the next preceding page in *Buller*, (p. 244.) an adjudged case is given which completely overturns his distinction. It is the case of *Lane v. Degberg*, decided in 11 W. III., prior to the decision before Baron *Price*. It was an action by a soldier against his officer for an assault and battery. The officer justified the act as done in the army for disobedience, and gave in evidence the sentence of a council of war, founded on a petition of the plaintiff against him; and the acquittal, being the sentence of a Court of exclusive jurisdiction in a case arising under martial law, was held to be conclusive evidence for the officer in the action for the assault and battery. Lord *Thurlow*, who acted as attorney-general on the trial of the *Dutchess of Kingston*, cited this case as good law; and it appears to me that, in all the learned and profound discussions to which the *Dutchess of Kingston's* case gave rise, it was never controverted, but it was a conceded point, that a sentence *in rem*, pronounced by a Court of peculiar and exclusive jurisdiction, was, as to the question of rightful seizure or forfeiture of the property in controversy, binding and conclusive upon all mankind.

But, admitting that the decision in the District Court was not binding, and the right of seizure was to be tried over again, I am, then, of opinion, on the merits, that the plaintiff's ship was never armed and equipped with any intent contrary to the act of congress.

I am persuaded the plaintiffs in error have no faith in the soundness of their position. If they had, why did they not procure an appeal from the decision of the District Court? The

IN ERROR.

ALBANY,  
February, 1816.KINGSTON  
V.  
HOYT.

[ \* 585 ]

## IN ERROR.

ALBANY,  
February, 1816.GELSTON  
v.  
HOYT.

\*whole proceeding was, doubtless, very much under their control, and their agency would have been as effectual for this purpose as it was originally in the institution of the suit. The government itself has no confidence in this ground, or it would never have suffered so important a question to have slept quietly under the decision of a single judge.

The prohibition was against fitting out any vessel to be employed "in the service of any foreign prince or state," against "another foreign prince or state with whom the *United States* were at peace." The evidence offered was, that the ship was fitting out to be employed in the service of *Petion* against the government of *Christophe*.

It is a well-known fact, that the part of the island of *St. Domingo* under the government of those chiefs was, at the commencement of the *French* revolution, a colony of *France*, and that the authority of *France* was afterwards destroyed by the insurrection of the blacks. It is equally notorious, that *France* never renounced her claim to dominion over that colony; and in 1801, she sent a fleet and army to subdue it.

It may also be stated, as a further fact, resting on the same public notoriety, that the government of the *United States* have never, by any public act whatever, recognized either *Petion* or *Christophe*, or any other prince, or emperor, in *St. Domingo*, as independent powers, with whom the customary relations of peace and amity were to be maintained. The act of congress of the 28th of *February*, 1806, which I believe was cited upon the argument, is decisive evidence of the sense of the government. It prohibited all commercial intercourse between the *United States* and any person, or persons, resident within any part of the island of *St. Domingo* not in possession, and under the acknowledged government, of *France*. At that time, all the *Spanish* part of *St. Domingo* had been ceded to *France*, so that the act was made on purpose to apply to every part of the island which might be considered, by *France*, as in rebellion. We have no concern, at present, with the policy of this statute. It is sufficient that it shows the unequivocal sense of the administration; and my position is, that it belongs to the government, and not to the Courts of justice, to determine our foreign relations; and, especially, to determine the time when the recognition of new states is called for upon principles of national policy.

[\* 587]

The act of congress of 1794, under which the seizure was \*made, did not relate, when it was passed, to the independent governments in *St. Domingo*; for they did not then exist; and when they do exist, so as to come within the purview of the law, as "foreign princes, or states, with whom we are at peace," must depend upon the pleasure and the solemn act of the government itself.

It is a very strange and novel doctrine, that it belongs to the  
482



municipal Courts to anticipate the views, and distract the policy of the government, by being the first to acknowledge new states, as they may successively arise in the revolutions of the world. There never could be more unfit organs for this purpose. The Courts are, by their very constitution, passive and tranquil, and devoted to the administration of domestic justice. They have no concern with foreign intercourse, and no knowledge of the secret springs and complicated policies of nations. Among all the volumes on public law, not a passage is to be found which bestows such a function upon the judicial power; and as often as the question has arisen in the discussions on private right, the judges have uniformly disclaimed the authority.

In the case of *The City of Berne v. The Bank of England*, which came before Ld. Eldon in 1804, (9 *Vesey*, 347.) a motion was made to restrain the bank from permitting a transfer of certain funds belonging to the old government of *Berne*, before the conquest and revolution of *Switzerland* by the acts and arms of *France*. The motion was objected to on the ground that the existing government of *Switzerland*, not being acknowledged by the government of *England*, could not be noticed by the Court. The chancellor denied the motion, for the reason that a judicial Court cannot take notice of a government never recognized by the government of the country in which the Court sits. The same point came before the lords commissioners of appeals in prize causes, in *March*, 1808, and they decided, that *St. Domingo* was still, in point of law, under the dominion of *France*, and to be considered an enemy's colony; and that the Courts could not undertake to determine otherwise, as it had not been otherwise declared by the government. This decision of the lords commissioners was referred to by Sir *Wm. Scott*, in the case of the *Manilla*, (1 *Edw. Adm. Rep.* 1.) and he considered it as most undoubtedly correct.

These are decisions of the highest authority in *England*; and we have a similar decision of the highest authority in this country.

\*In *Rose v. Himely*, (4 *Cranch*, 241.) it was declared by the Supreme Court of the *United States*, that it was for governments to decide whether they could consider *St. Domingo* as an independent nation; and until such decision should be made, or *France* should relinquish her claim, Courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of *France* over that colony as still subsisting. It was said upon the argument, that this was to be considered as the *dictum* of the chief justice, and not the opinion of the Court, on a point arising in the cause. But I apprehend this to be a mistake. The chief justice, in giving the opinion, observed, that the relative situation of *St. Domingo* and *France* came necessarily to be considered; and if so, the decision of that point was materially involved in the judgment of the Court. And, while on this case, it is worthy of notice, that the decision

IN ERROR.

ALBANY  
February, 1816.GELSTON  
V.  
HOTT.

[ \* 588 ]

**IN ERROR.**ALBANY,  
February, 1816.GELSTON  
v.  
HOYT.

here, and the decision before the lords commissioners of appeals, were remarkably coincident in point of time, as both were made within the same month, and without any possible influence of the one upon the other.

It appears to me, then, that this great turning point on the merits of this case, is equally well supported by reason and authority; and it is not in my power to entertain any doubt as to what ought to be our conclusion.

I am, accordingly, of opinion that the judgment of the Supreme Court ought to be affirmed. (a)

(a) At the conclusion of his opinion, his honor, in answer to the argument of the counsel for the plaintiffs in error, drawn from the present state of the governments of *St. Domingo*, made the following observations:—

It has been urged, by the counsel here, that the governments in *St. Domingo* were, in fact, and of right, independent; that they were administered with wisdom, and entitled to be acknowledged by us as independent states. I might, perhaps, be deemed wanting in attention to the learned counsel, if I passed over in silence these observations, which, however, I think, would have been more suitably addressed to the government than to us. The Courts have no business with the question how far, and when, it becomes proper to acknowledge a foreign power. It is a matter of policy, and not of legal obligation. The simple fact of the recent erection of an independent state, cannot form, of itself, and without reference to other views and considerations, a sufficient basis on which government can act. Nothing can be more transient, as the experience of this age has taught us, than newly-erected powers in revolutionary times, or in the turbulent state of the *European* colonies. They must give evidence of stability before they can command confidence. When the act of congress was passed, in 1806, disclaiming all countenance of the rebellious powers in *St. Domingo*, it was well known to the government, that *Dessalines*, under the title of emperor, was then reigning as absolute master over nearly the whole island. But I am very far from meaning to cast any blame upon our government for its reserve in respect to those powers; for in what age or nation do we meet with a more rapid succession of revolution than this same ill-fated island has been doomed to experience?

Without noticing the convulsions which agitated the island for the first ten years, which opened a civil war of extraordinary violence, and which threatened to destroy the last vestiges of civilization, if not to exterminate the inhabitants, we find that, by the year 1801, *Toussaint* had recalled the laws of justice, and assumed and consolidated a peaceable authority. He had subdued *Rigaud* and other brigands. He had besieged and taken the city of *St. Domingo*, and broken up the last asylum of *French* dominion. He had established a wise and liberal constitution, and became the protector of the whites, and the encourager of our *American* trade. This *Black Prince* was a man of good sense, probity, and virtue; and he imparted consolation to his subjects for the horrors they had witnessed, and the miseries they had endured, by a reign of prosperity and justice, moderation and glory. But the scene was as fleeting as it was brilliant. After the arrival of the *French* army, under *Le Clerc*, in 1802, he was perfidiously kidnapped, and sent, loaded with chains, to *France*, where he was suffered to languish and expire in the horrors of a dungeon. The blacks soon took ample vengeance on their enemies. The *French* army was wasted by incessant warfare and by pestilence, and the remains of it escaped from the island in 1803, by a voluntary surrender to the *English*. The independence of the blacks was then re-assumed, and *Dessalines* became their ruler, under the title of Emperor of *Hayti*. His reign was one career of rapacity, lust, and cruelty; and he fell, in 1806, by assassination, provoked by the overruling principle of self-preservation, and the impulse of universal indignation at the monster. His repeated massacres of the whites had been quietly endured, but, like *Domitian*,

—“*Periit, postquam ceteronibus esse timendus  
Ceperat; hoc nocuit Lamiarum coede madenti.*”

His successors were the rival chiefs *Christophe* and *Petion*, who soon divided the empire between them; and, from that time to this day, they have carried on a fierce and implacable war against each other. Nearly all the white, and, perhaps, three fourths of the black population which existed in 1789, perished in these revolutions; and the fury of the human passions has converted one of the finest and most fertile islands on the face of the globe, into a region fruitful only in crimes, and frightful with desolation.

Such is the sad story of these independent powers in *St. Domingo*. What future destiny awaits them, no mortal eye can foresee. The prospect is, indeed, a little cheered by some wise measures lately proceeding from one of these chiefs. But, at present, I think we must all concur in opinion, that the recognition of these powers, by the *United States*, is a question of serious and complicated policy, requiring, at all times, the utmost consideration and discretion in the government, and very unfit to be decided, at any time, by the Courts of justice.

\*This being the unanimous opinion of the Court, [two of the senators only being absent,] it was, thereupon, ORDERED and ADJUDGED, That the judgment of the Supreme Court be, and the same is, hereby affirmed; and that the defendant recover against the plaintiffs his *double costs* for his defence of the said \*writ of error, to be taxed, and that the record of proceedings be remitted to the Supreme Court, to the end that this judgment be executed. (a)

IN ERROR.

ALBANY,  
February, 1816.

GELSTON

V.

HOYT.

April 1st.

[\* 590]

April 3d.

A motion was made by the defendant in error for interest on the judgment to be taxed, by way of damages, under the 13th section of the act concerning costs.

*Per totam Curiam.* The allowance of interest on the judgment of affirmance, by way of damages, rests in the discretion of the Court, and where the cause of action, in the Court below, was a *tort*, it is not in the course to allow interest. Interest is, therefore, denied; but double costs are allowed to the defendant, under the 14th section of the act. (b)

(a) A writ of error was brought on the above judgment, from the Supreme Court of the United States, which was presented to this Court after the transcript of the proceedings had been sent back to the Court below; and the following return to the writ of error was made by this Court. "State of New-York, ss. The president of the senate, the senators, chancellor, and judges of the Supreme Court, in the Court for the Trial of Impeachments and the Correction of Errors, certify, and return to the Supreme Court of the United States, that, before the coming of their writ of error, the transcript of the record in the cause, in the said writ of error mentioned, together with the judgment of this Court thereon, and all things touching the same, were duly remitted, in pursuance of the statute, instituting this Court, into the Supreme Court of Judicature of this state, to the end, that further proceedings might be thereupon had, as well for execution as otherwise, as might be agreeable to law and justice; and in which Supreme Court of Judicature, the said judgment, and all other proceedings in the said suit, now remain of record; and as the same are no longer before, or within the cognizance of this Court, this Court is unable to make any other, or further return to the said writ. All which is humbly submitted."

In May term, application was made to the Supreme Court, by the plaintiff below, for leave to take out an execution on the judgment, the *remittitur* from the Court of Errors having been filed with the clerk of the Supreme Court; a motion was, at the same time, made on the part of the defendant below, for leave to annex the transcript of the record to the writ of error from the Supreme Court of the United States; but no decision was made on the subject, the counsel for the parties agreeing that the transcript of the record should be annexed to the writ of error, so that the cause might be carried up to the Supreme Court of the United States, reserving the question as to the regularity or propriety of the proceeding, to be determined by that Court.†

(b) Vide *Law v. Jackson*, 2 *Wendell's Rep.* 209. (2 *Cow. Rep.* 579. *Stone v. Bart*, 3 *Cow. Rep.* 379.) *Blissell v. Hopkins*, 4 *Cow. Rep.* 53.

† The judgment was affirmed in the Supreme Court of the United States. Vide 15 *Johns. Rep.* 221.

## END OF THE CASES IN ERROR.

\*. The remainder of the cases in error, for 1816, will be found at the commencement of the next volume.

# INDEX

TO

## THE PRINCIPAL MATTERS

IN THE THIRTEENTH VOLUME.

---

### A.

#### ABATEMENT.

*Vide* ATTORNEY.

#### ABSENT AND ABSCONDING DEBTORS.

*Vide* COURTS OF JUSTICES OF THE PEACE, III. 11.

#### ACT OF CONGRESS of June 5, 1794.

Fitting out vessels to be employed in the service of one foreign state against another, with whom the *United States* are at peace.  
*Vide* INDEPENDENT STATE.

#### ACTION.

When bailable. *Vide* BAIL, 1. 6.

Parties to action. *Vide* PLEADINGS, I.

#### ACTION ON THE CASE.

1. An action on the case, in the nature of waste, lies against the assignee of a lessee. *Short v. Wilson and others*, 33
2. Fraud, or deceit, accompanied with damage, is a good cause of action. *Burney v. Dewey*, 224
3. In the case of a gift of a chattel, which the donor affirms to be his, if the donee is afterwards evicted by the rightful owner, he may maintain an action against the donor. *ib.*
4. An action on the case lies for seducing and harboring the servant or slave of the plaintiff, notwithstanding the penalty given by the act concerning slaves and servants, (2 N. R. L. 279.) which is a cumulative remedy. *Scidmore v. Smith*, 322
5. An action on the case for a deceit lies for fraudulently selling land which has no real existence, notwithstanding any covenants in the deed, which the plaintiff may treat as a nullity. *Wardell v. Fordick and Davis*, 325
3. Where a person is induced to purchase land, by a false representation that a certain privilege is annexed to the land, but which is not included in the deed, he may maintain an action on the case against the vendor. *Monell and Waller v. Colden*, 305

7. Where a person was induced to purchase and give a higher price for a lot of land upon a navigable river, by a fraudulent representation that he would, as proprietor of the land, be entitled to a grant from the commissioners of the land-office, of the land covered with water adjacent thereto, and the purchase being completed, the purchaser, on applying for a grant from the commissioners, discovered that the adjacent land, under water, had previously been granted, and that the title to it was out of the state; it was held that the purchaser might maintain an action on the case for the deceit. *ib.*

8. It seems that the measure of damages, in such case, is the difference between the value of the land conveyed, and the sum which the purchaser was induced to pay by the fraudulent representation. *ib.*

9. The owner of a domestic animal is not liable for injuries which it may have committed, unless he had notice that it was accustomed to do mischief. *Vrooman v. Lawyer*, 339

*Vide* BAILMENT. SALE OF CHATTELS, 1, 2, 3.

4. SLAVES AND SERVANTS. TRESPASS, 10.

#### ACTION ON STATUTES.

Where a penal statute gives no form of declaring, the plaintiff must set forth specially the facts which constitute the offence. *Bigelow v. Johnson*, 428

*Vide* ACTION ON THE CASE, 4. HORSE-RACING. INNS AND INNKEEPERS. MAINTENANCE.

#### ADMINISTRATION.

*Vide* ADMINISTRATION BOND. ALIEN. EXECUTORS AND ADMINISTRATORS.

#### ADMINISTRATOR.

*Vide* EXECUTORS AND ADMINISTRATORS.

#### ADMINISTRATION BOND.

1. In an action against the surety on an administration bond, it is sufficient for the plaintiff to state that goods, chattels, and sums of money, of the deceased, to a large amount, to wit, the amount of, &c., had come into the hands of the administratrix,

- which she had converted and disposed of to her own use, &c., the creditor not being presumed to know precisely what goods, &c., the administratrix had, and this fact lying more properly in the knowledge of the defendant. *The People v. Dunlap*, 437
2. The non-payment of a judgment obtained against the administratrix may be assigned as a breach of the condition of such a bond. *ib.*
  3. The surety, in an administration bond, is liable for a mal-administration of the effects of the deceased, and the condition of the bond is not to be restricted merely to the exhibiting of an inventory within six months from the date, into the office of the surrogate of the county. *ib.*
  4. And such bond may be put in suit against the sureties, at the instance, and for the benefit, of the creditor. *ib.*

#### ADVERSE POSSESSION.

*Vide*: DEED, II. 8. EJECTMENT, I. NEW TRIAL.

#### AFFIDAVITS.

*Vide* PRACTICE, II.

#### AGENT.

1. A party who would excuse himself from responsibility, on the ground that he acted as the agent of another, ought to show that he communicated to the other party his situation as agent, and that he acted, in that capacity, so as to give a remedy over against his principal. *Mauri v. Heffernan*, 58
2. A person who seals a bond as attorney for another, without authority, is personally liable, as if he had covenanted in his own name. *White and others v. Skinner*, 307
3. Where the defendant to an action of covenant pleaded, that the plaintiffs, himself, and others, were associated as copartners under a certain firm, and that he, with B. and C., were appointed agents and directors for the company, and that he executed the agreement in his capacity of agent and director, and not otherwise, without averring or setting forth his authority, the plea, on demurrer, was held bad. *ib.*
4. Where a person seals a deed, or executes a covenant, in behalf of others, he is bound to aver, or set forth and prove, the authority under which he acted. It is not enough to crave oyer of, and set forth the instrument executed by him, in his plea. *ib.*
5. In an action against an agent for money alleged to be due to the plaintiff, the defendant may give in evidence a parol order from his principal not to pay the money. *Thorne v. Peck*, 315
6. An agreement relating to a partition, made in 1764, executed by a third person in the name of one of the parties, who, it did not appear, had any authority to execute it, was held to be ratified by the subsequent acts of the party in whose name it was

made. *Jackson, ex dem. Klock and others, v. Richtmyer*, 367

7. A decree against the principal binds the agent, who must look to the principal for indemnity. *Gelston and Schenck v. Hoy*, 561

*Vide* ESTOPPEL, 2. FACTOR. MORTGAGE, 1

#### AGENT OF GOVERNMENT.

Where it does not appear that an agent, in making a contract, acted, expressly or ostensibly, as a public agent, it will be deemed a private contract. *Swift v. Hopkins*, 313

#### AGREEMENT.

1. Where there is a contract of hiring for a definite time, at a certain rate per day, and, a part only of the time having elapsed, the parties settle the amount of the wages which had then been earned, and the hirer gives his note to the servant for the amount; in an action on the note, it is no defence that the payee had left the maker's service before the expiration of the time for which he had been originally hired, although, had there been no subsequent modification of the agreement, he could not have recovered wages until he had served the whole period agreed upon. *Thorpe v. White and others*, 53
2. A. executes certain promissory notes to B., and procures land, of which he is the *cestui que trust*, to be conveyed to B., under an agreement that B., on the payment of the notes, should reconvey the land; the notes not being paid, and B. having exercised acts of ownership on the land, by selling, &c., he cannot support an action on the notes, there being a failure of consideration, and the agreement being void on the non-payment of the notes, if B. elected so to consider it; and, by exercising acts of ownership, he determined his election, and had a complete title to the land. *Winter v. Livingston*, 54
3. A note given for the use of a billiard table is not illegal, unless it appear that the person to whom it was given kept a tavern, or that it was for money lost at play. (1 N. R. L. 178, 179.) *Northrop v. Minturn*, 85
4. A. and B. having executions against C., of which A's execution was the elder lien, and C. being indebted to D., it was agreed between A. and D. that A. should pay D. 225 dollars; that, at the sale under the executions, A. should bid off the personal property of C. to the amount of his execution, and that D. should bid off the real property of C. to the amount of B.'s execution, should dispose of the same, and, after satisfying his own demands against C., should refund A. the said sum of 225 dollars. A. and D. at the sale bid off the property of C. in conformity to the agreement, and D. disposed of the real estate

and after satisfying his own demands against C., there was a sufficient overplus to repay A., and A. brought his action to recover the money. Held, that although there was a sufficient consideration to support D's promise, yet that the agreement itself was void, being contrary to public policy, as it was an agreement tending to prevent competition at a sale under execution, and thus injurious to the original debtor. *Thompson v. Davies*, 112

5. An agreement to convey, containing words of bargain and sale in *presenti*, does not transfer the title. *Ives v. Ives*, 235
6. An agreement to sell land does not import a license to enter, but, at most, gives an implied permission to occupy as tenant at will. *ib.*
7. Where a person agreed to sell land to another, and covenanted to give a deed of the premises to him, at a certain time and place, the tender of a deed without covenant or warranty is a performance of the covenant; nor is it necessary that the wife of the vendor should join in the deed. *Ketchum and Sweet v. Evertson*, 359
8. A party who has advanced money, or done any act in part performance of an agreement, but refuses to proceed to the completion and execution of the contract, the other party having performed, or being ready to perform, every thing agreed to be done on his part, cannot recover back the money he has advanced, nor is he entitled to compensation for what he may have done in part performance; and after such refusal to proceed, or voluntary abandonment of the contract by the vendee, the vendor is at liberty to sell the land to another. *ib.*

*Vide ASSUMPSIT*, 7. *BILLS OF EXCHANGE AND PROMISSORY NOTES*, 8. *ESCAPE*, 4. *FRAUDS*, (STATUTE OF.)

#### ALBANY.

*It seems that the Mayor's Court of Albany has no jurisdiction under the act for the relief of debtors, with respect to the imprisonment of their persons, in case of a debtor imprisoned in the county of Albany, under an execution out of the Supreme Court; but that the common pleas of Albany county have jurisdiction in such case.* *M' Eroy v. Mancius*, 121

#### ALIEN.

Where an alien dies in this state intestate, without issue, during a war with his native country, leaving personal property, his relations abroad, though next of kin, being alien enemies, residing in the country of the enemy, are not entitled to distributive shares of the property, but the whole will go to his next of kin resident in this state. *Bradwell and Bradwell v. Weeks*, 1

#### AMBIGUITY.

*Vide EVIDENCE*, II. 23, 24.

#### AMENDMENT.

1. An original *si te fecerit securum* cannot be amended by altering it to a summons; for the writ being conformable to the *præcipe*, there is nothing to amend by. *Lynch v. Mechanics' Bank*, 127
2. In an action for a libel, the declaration was allowed to be amended on motion of the plaintiff, after issue joined, so as to change the venue; it resting in the sound discretion of the Court under the circumstances of the case. *Paine v. Parker*, 329

#### ANIMALS.

*Vide ACTION ON THE CASE*, 9. *TRESPASS*, 6, 7, 8.

#### APPEAL.

*Vide INJUNCTION*, 1.

#### APPRENTICE.

1. The discharge of an apprentice by an order of three justices, does not affect the validity of the indentures, so as to prevent the master from setting them up as a defence in an action against him to recover the value of the services of the apprentice. *Schermerhorn v. Hull*, 270
  2. Where a person is relieved on his own application, by an overseer of the poor, without a previous order for that purpose, this is sufficient to authorize the overseers of the poor to bind out the children of such persons, as poor apprentices; the want of the order only coming in question on the settlement of the overseer's accounts, and not invalidating the indentures of the apprenticeship, at least so far as to prevent the master from using them as a defence in an action to recover the value of the services of the apprentice. *ib.*
- Settlement by binding and service*, *vide Poza*, 1.

#### ARBITRATION.

*Vide AWARD*.

#### ARREST OF JUDGMENT.

*Vide JUDGMENT*, II.

#### ASSAULT AND BATTERY.

On an indictment for an assault and battery, the trial will not be stayed because a civil suit is pending, to recover damages for the same assault and battery, though, it seems, judgment, after conviction, may be stayed until the decision of the civil suit. *The People v. The Judges, &c. of Genesee*, 85

#### ASSIGNMENT OF LEASE.

*Vide ACTION ON THE CASE*, 1.

#### ASSUMPSIT.

1. Where an action is brought for the non-performance of a contract, the defendant may show, under the general issue, that he offered to perform his part of the con-

- tract, but was prevented by the act of the plaintiff. *Wilt and Green v. Ogden*, 56
2. Where *A.* sells and delivers goods to *B.*, for which *B.* is to pay in work and labor, and *A.* brings an action against *B.* on the agreement, which is defeated by proof that *B.* had offered to perform his part of the agreement, but was prevented by the act of *A.*, *A.* will not be permitted to waive the agreement, and recover back from *B.* the original consideration. *ib.*
  3. Where a party enters into a special contract, and having performed part of it, without the consent or default of the other party, voluntarily abandons the further performance of it, he cannot maintain an action on the implied assumpsit, for the labor actually performed. *Jennings v. Camp*, 94
  4. Where a special contract is still in force, the plaintiff cannot resort to the general counts. *ib.*
  5. Where a contract is entire, a full performance is a condition precedent to the plaintiff's right of action. *ib.*
  6. *P. Thorpe v. White and others*, 53
  6. Where, on a submission to arbitration, the parties mutually execute promissory notes to one another, as security for the payment of the sum which may be awarded, and the arbitrators, having awarded in favor of *A.*, the one party, deliver to him the note of *B.*, the other party, and *A.* endorses the note to *C.*, to whom *B.* is compelled to pay the amount, and *B.* seeks to recover back from *A.* the sum so paid to his endorsee, on the ground that the award was void, *B.* cannot recover against *A.* if he could have insisted on the invalidity of the note, as a defence to an action by *C.*; or, if such defence were then inadmissible, he must show that he could not have availed himself of it, by averring that the note was transferred before it fell due. *Batley v. Button*, 187
  7. Where, an officer having a defendant in execution, *A.* promised that if the officer would release the defendant, he would pay the amount of the execution, if he failed to redeliver him to the officer on a certain day, and the officer, accordingly, released him, it was held that the officer could maintain no action against *A.* on his promise. *Wheeler v. Bailey*, 366
  8. Whether a moral obligation will support an action on an implied assumpsit? *Quere. Overseers of Tioga v. Overseers of Seneca*, 380  
*Vide Poos*, 2.
  9. Although, in some cases, an action may be maintained on a promise, the consideration for which moves from a third person, by the party in whose favor the promise was made, yet, when neither the consideration moves from the plaintiff, nor the promise was made to him, or for his benefit, an action cannot be maintained. *Shear v. Overseers of Hillsdale*, 496

Assumpsit against a corporation, *vide* CORPORATION, 3.

Assumpsit against a sheriff to recover money levied under an execution, *vide* EXECUTION, 7, 8.

Assumpsit for use and occupation, *vide* USE AND OCCUPATION.

*Vide* ASSUMPSIT FOR WORK AND LABOR, 3, 4.  
ASSUMPSIT FOR MONEY HAD AND RECEIVED, 1.

# ASSUMPSIT FOR WORK AND LABOR.

1. Where a servant is hired for a year, at a certain rate per day, it is an entire contract, and the servant cannot recover his wages until the expiration of the year. *Thorpe v. White and others*, 53  
*Et vide Jennings v. Camp*, 94  
*Webb v. Duckingfield*, 390
2. But if, before the expiration of the year, the hirer gives his servant a note for the amount of wages then earned, it is no defence in an action upon such note that the payee had left the maker's service before the expiration of the time for which he had been originally hired. *Thorpe v. White and others*, 53
3. The plaintiff, after he came of age, lived with and worked for his father, the defendant, who said he would reward him well; and provide for him in his will; held, that the plaintiff could not recover compensation for his services during the lifetime of his father. *Patterson v. Patterson*, 379
4. But it seems that, if the defendant should die without providing for the plaintiff in his will, he would then be entitled to maintain an action for a reasonable compensation for his services. *ib.*

*Vide* APPRENTICE. ASSUMPSIT, 3.

# ASSUMPSIT FOR GOODS SOLD.

In an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or, if the unsoundness produced merely a partial diminution of the value, he may show that part in mitigation of damages. *Beecker v. Vrooman*, 302

# ASSUMPSIT FOR MONEY HAD AND RECEIVED.

1. Where land is sold and described in the deed as *supposed* to contain a certain quantity, and a deficiency is afterwards discovered, there is no obligation on the grantor to compensate the grantee for such deficiency; and a promise to pay for the same is without consideration, and will not support an action of assumpsit. *Smith v. Ware*, 257
2. Where a person becomes surety to the owner of a vessel, that certain seamen shipped on board the vessel should pro-

seed upon the voyage, and the seamen receive wages in advance, which they pay to their surety as his indemnity, in case the seamen desert the vessel before the commencement of the voyage, the owner cannot maintain an action for money had and received against the surety, to recover back the wages advanced. *Dodge v. Lean*, 508

3. *A.*, the administrator of an intestate estate, under an order of the surrogate, sold certain land of the intestate, and took a bond and mortgage from the purchaser to secure the consideration; he afterwards drew an order upon the purchaser in favor of *B.*, for part of a debt due from his intestate to *B.*, stating in the order, that the amount should be credited on the bond and mortgage; but the purchaser refused to pay the order, as the bond and mortgage had been assigned to *C.*; it was held, that *A.*, having received the full amount of the bond and mortgage from the assignee, and being credited for the amount of the debt to *B.* in his account with the surrogate, was liable in his individual capacity to *B.* for the amount of the order, as for money had and received to his use. *Mosher v. Hubbard*, 510

Assumpsit against sheriff to recover money levied under an execution, *vide* EXECUTION, 7, 8.

*Vide* AGREEMENT, 8. ASSUMPSIT, 2.

#### ASSUMPSIT FOR MONEY PAID.

Where *A.* transferred to *B.* stock in a turnpike company, which, at the time of the transfer, appeared by the books of the company to have been fully paid up, by a credit of interest on the amount before paid in, pursuant to a resolution of the directors, and this resolution was, after the transfer, repealed, and the stockholders called upon to pay in the amount before allowed for interest, in consequence of which *B.* paid to the company that sum on the shares transferred to him by *A.*, it was held, that *B.* could not maintain an action to recover the amount from *A.*, there being neither fraud nor a warranty. *Cunningham v. Spier*, 392

Assumpsit by surety against principal, *vide* SURETY, 1.

*Vide* AWARD, 6. SALE, 2.

#### ATTACHMENT, OR PONE.

*Vide* ORIGINAL WRIT, 1, 2, 4.

#### ATTORNEY.

1. An attorney, sued jointly with others, is not entitled to privilege. *Tiffany v. Driggs and Lynch*, 252
2. Where an attorney is sued in a justice's Court, jointly with another defendant, he cannot plead in abatement that the Court, of which he is an attorney, is then sitting. *ib.*

Costs in action against, *vide* COSTS, II. 11.

When a competent witness, *vide* EVIDENCE, IV. 26, 27, 28, 29.

Private attorney, *vide* AGENT.

#### ATTORNMENT.

1. Where a person enters upon land without title, and the tenants surrender their possessions and attorn to him, the attornment is void. *Jackson, ex dem. Livingston, v. Delancy*, 537
2. A void attornment is not the commencement of an adverse possession. *ib.*

#### AUTHORITY.

*Vide* AGENT, 2, 3, 4. FACTOR.

#### AWARD.

1. An award must be confined to the subject-matter of the submission, and must be final. *Solomons v. M Kinstry*, 27
2. An award of payment of a specific sum by one party to the other, is final, and sufficient without a release. *ib.*
3. Where an umpire awarded that the defendant should pay to the plaintiff a certain sum, with interest until paid, as the plaintiff appeared to have just claim on the defendant for that sum, or even more, if insisted on, and that, should any errors in addition, or calculation of interest, be found in the account, upon proof thereof being made, by the defendant, to the plaintiff, the plaintiff should immediately refund to the defendant the amount thereof, the award was held final and valid. *ib.*
4. Where an umpire was chosen and appointed of and concerning the premises, and it was stated that he took upon himself the burden of the umpirage, it is to be intended that he awarded concerning the subject-matter submitted. *ib.*
5. Where the words of an award are so comprehensive that they may take in matters not within the submission, it shall be presumed that nothing beyond the submission was awarded, unless the contrary be expressly shown. *ib.*
6. Where, on a submission to arbitration, the parties mutually execute promissory notes to one another, as security for the payment of the sum which may be awarded, and the arbitrators, having awarded in favor of *A.*, the one party, deliver to him the note of *B.*, the other party, and *A.* endorses the note to *C.*, to whom *B.* is compelled to pay the amount, and *B.* seeks to recover back from *A.* the sum so paid to his endorsee, on the ground that the award was void, *B.* cannot recover against *A.* if he could have insisted on the invalidity of the note as a defence to an action by *C.*; or, if such defence were then inadmissible, he must show that he could not have availed himself of it, by averring that the note was transferred before it fell due. *Batley v. Button*, 187



7. Where, on a submission to three arbitrators, one dissents from the award of the other two, who execute the award without the dissenting arbitrator, such award is valid. *ib.*
8. Where part of an award, which is void, is not so connected with the rest as to affect the justice of the case, the award is void only *pro tanto*. *Martin and others v. Williams*, 261
9. An award requiring one of the parties to the submission to cause a third person, whom it does not appear he has any right to dispossess, to deliver the possession of land to the other party, is void. *ib.*

## B.

### BAIL.

1. In an action of debt to recover the penalty given by the 14th section of the act concerning distresses, rents, &c., the defendant may be held to bail. *Watts v. Taylor*, 305
2. Bail may justify before officers authorized to take recognizance, on due notice. *Reg. Gen. Aug. 22, 1816*, 422
3. But a judge of this Court may, before justification, order it to be in open Court. *ib.*
4. When justification is not in open Court, either party may appeal to this Court. *ib.*
5. Actions on recognizances of bail, or bail bonds, taken in suits brought in Courts of common pleas, must be brought in the Court of the county in which the suit was originally commenced, if the parties who enter into the recognizance, or bond, reside within its jurisdiction, and not in this Court. *Bertus v. M'Carthy and another*, 424
6. In an action for damages for the non-delivery of goods, pursuant to contract, the defendant may be held to bail without a judge's order. *Bunting v. Brown*, 425
7. But if a defendant is arrested and held to bail in an action not bailable, an affidavit of the cause of action, subsequently made, will not support the arrest. *ib.*
8. If the sum in which a defendant is held to bail be too large, application may be made to a judge to mitigate it. *ib.*

### BAILMENT.

1. Any damage befalling a chattel, while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was bailed, must be sustained by the bailor. *Milton v. Salisbury*, 211
2. So, if a horse be hired to go a journey, and, during the due prosecution of the journey, without any ill-treatment by the hirer, it becomes lame, the hirer is not answerable for damages. *ib.*

*Vide* TITLE TO PROPERTY.

### BAKER'S FALLS.

*Vide* KAYADROSSERAS PATENT, 2.

## BARGAIN AND SALE.

*Vide* AGREEMENT, 5.

## BARON AND FEME.

1. A divorce of persons domiciled in this state, decreed in another state, is invalid here. *Pauling and wife v. Willson and Smith*, 192
2. But if the parties, although domiciled here, were married in the state in which the divorce was decreed, and appeared and litigated the question of divorce there, whether it might not, under these circumstances, be valid? *Quere. ib.*
3. But admitting such decree to be valid, if it made no provision with regard to the children of the marriage, and there was no agreement between the parties as to their maintenance, the mother cannot, (the guardianship of the children having been decreed to her,) it seems, support an action against the father for their maintenance, both parents being equally bound to maintain them; she can, at most, sue him for contribution only. *ib.*

## BARRATRY.

*Vide* INSURANCE, 2, 3, 4.

## BILL OF EXCEPTIONS.

1. It seems that a bill of exceptions will not lie in a criminal case. *The People v. Holbrook*, 90
2. A bill of exceptions signed by two judges only of the Court of Common Pleas, is not such a bill of exceptions as this Court will judicially take notice of, or grant a writ to require the justices to come in and confess or deny their seals. *Pratt v. Malcolm*, 320
3. The decision complained of should appear to have been made by three judges at least, being the smallest number that can constitute a Court of common pleas. *ib.*
4. Where the record is made up, a general assignment of errors to a bill of exceptions is sufficient. *Shepard v. Merrill*, 475

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Endorsement, and where the consideration may be inquired into.*
- II. *Demand and notice.*
- III. *Action and damages.*
1. *Endorsement, and where the consideration may be inquired into.*
1. Where, on the endorsement of a note, the consideration passing between the endorsee and his endorser, is not equal to the amount of the note, the endorsee, in an action against the endorser, can only recover the consideration which he has actually paid. *Braman v. Hess*, 52
2. *Aliter*, where the action is by the endorsee against the maker of the note. *ib.*
3. Where A. delivers a promissory note to B as agent of C., and A., at the same time

states to B., that there was not so much due C. as the amount of the note, to which statement B. makes no objection, and B., afterwards, as holder of the note, brings an action against A., A. will be allowed to show what was really due from him to C., and thus reduce the amount to be recovered by B., who does not stand in the situation of an innocent holder of the note, taking it before it becomes due, in a regular course of business. *Olmstead v. Stewart*, 238

ide AGREEMENT, 1, 2, 3. ASSUMPSIT, 6. AWARD, 6. FRAUDS, (STATUTE OF,) 1.

### II. Demand and notice.

4. Where the endorser of a promissory note resides in a different place from that in which it is payable, notice of the non-payment must be sent to him in the place in which he is actually resident, and if directed to a wrong place, without showing that due diligence was used to ascertain his residence, but without success, he will be discharged. *Bank of Utica v. Mott*, 432
5. The contents of a notice to the endorser of a promissory note, of a demand upon, and a refusal by the maker, may be proved by parol, or by producing a copy made by the witness at the time of making the original; and it is not necessary that notice to produce the original should have been given. *Johnson v. Haight and Mathews*, 470
6. Payment of a note must be demanded of the maker, in order to charge the endorser, upon the third day of grace, or if the third day falls upon a Sunday, then upon the second day of grace. *ib.*

### III. Action and damages.

7. If the holder of a note, after the time of payment, and after a suit has been commenced against the endorser, release the maker by writing not under seal, and without consideration, such release is void, and is no defence in the action against the endorser. *Crawford v. Millsbaugh*, 87
8. A bill of exchange was drawn in the United States upon A. of London, on which the defendants were endorsers; before the bill became due, B., the agent of the defendants, offered C., the holder of the bill, to pay it, in case A. did not, for the honor of the defendants, and C. promised to let him have the bill for that purpose; the bill not having been paid by A., B., being informed of the circumstance, requested C. to let him have the bill, and that he would pay it; this C. declined, and said that the bill had been put into the post-office to be returned to America; it was held, that B. ought to have been ready in London, to take up the bill when it became due; that his offer to pay when the rights of the parties had become fixed, was of no avail; that the previous promise of C. to let him have the bill, in order to pay it,

was a *nudum pactum*; and that, under the circumstances of the case, the plaintiff was not precluded from recovering 20 per cent. damages on the amount of the bill. *Denston v. Henderson and Cairns*, 322

9. The plaintiff in an action on a foreign bill of exchange, is entitled to recover the amount of the bill according to the rate of exchange, at the time of notice of its dishonor to the defendant, with 20 per cent. damages calculated on the nominal amount of the bill, and with interest on those two sums from the time of notice. *ib.*
10. Where suits are brought against the maker and endorser of a promissory note, and the endorser pays the amount, and it is agreed between the holder and endorser, that the suit against the maker shall be prosecuted for the benefit of the endorser, the maker cannot avail himself of the payment by the endorser as a defence in the suit against him. *Mechanics' Bank v. Hazard*, 353
11. And the payment by the endorser having been made after judgment against the maker of the note, his bail cannot avail themselves of the defence in a suit on the recognizance. *ib.*
12. But it seems, that if the plaintiffs had remained the real parties to the suit, the defendant might have availed himself of the payment by the endorser. *ib.*

Vide AGREEMENT, 1, 2.

## C.

### CAPIAS AD SATISFACIENDUM.

Vide EXECUTION, 11, 12.

### CAPTURE.

1. A capture and an immediate recapture do not divest the property of the original owner. *Cook v. Howard*, 276
2. Property taken in a battle on land does not vest in the captor, at least not until after the battle is over; and if it be retaken during the battle, the title of the original owner is not divested. *ib.*
3. Property taken from an enemy in a war on land, belongs to the sovereign of the captor. *ib.*

### CERTIORARI TO A JUSTICE'S COURT.

1. Where it is stated in a return to a *certiorari*, that the cause was tried under a repealed act relative to justices' Courts, the mistake of the act does not affect the jurisdiction of the justice. Per *Spencer, J.* *Chapman v. Smith*, 80
2. A justice's refusal to endorse the defendant's exemption from imprisonment, upon an execution, is no ground for reversing the judgment. *Spafford v. Grifin*, 323

### CHAMPERTY.

Vide MAINTENANCE.

**CHANCERY.**

*Vide* INJUNCTION.

**CHATTELS.**

The word *chattels* denotes property and ownership. *The People v. Holbrook*, 90

**CITIES.**

*Vide* ALBANY.

**COMMISSION.**

*Vide* USURY, 1, 2, 3.

**COMMON SCHOOLS.**

1. Persons not inhabitants of a town, are not liable to be taxed for the support of common schools in that town, (1 *N. R. L.* 261.) and if a tax be assessed and levied upon the property of such non-resident, not only the trustees who issue the warrant, but also the collector who executes it, are trespassers. *Snydam and Wyckoff v. Keys*, 444
2. The trustees having but a special and limited authority, the officer is bound to see that he acts within the scope of their legal powers. *ib.*

**COMPENSATION.**

*Vide* SALE, 2.

**CONFESSION.**

*Vide* EVIDENCE, II. 14, 15.

**CONSIGNOR AND CONSIGNEE.**

*Vide* FACTOR.

**CONTRACT.**

*Vide* AGREEMENT. ASSUMPSIT.

**CONVEYANCE.**

*Vide* DEED. FINE.

**CORPORATION.**

1. Where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them, by the name mentioned in the deed. *New-York African Society v. Verick and others*, 38
2. In debt, on bond, to the committee or trustees of a corporation, *solvendum* to the corporation by its true name, the corporation may declare in their own name, and allege that the bond was made to them by the description of the committee, &c. *ib.*
3. An action of assumpsit against a corporation must be commenced by summons, and not by attachment. *Lynch v. Mechanics' Bank*, 127

**COSTS.**

- I. *Costs in general.*
- II. *Costs in particular actions, and in actions by and against particular persons.*

I. *Costs in general.*

1. Electors of the grand assize, on a writ of right, are entitled to the same fees for attending the court as the sheriff, viz. 3 dollars *per diem*, for going to and returning from the Supreme Court. *Bryan v. Seely*, 123
2. A bond, as security for costs, in the case of a non-resident plaintiff, executed at the trial, and tendered to the defendant's counsel, who, admitting the sufficiency of the obligors, refuses to receive it, and it is then filed with the clerk, is a valid security, of which the defendant may avail himself in case of a verdict in his favor, or the plaintiff becoming nonsuit. *Brandige v. Hale*, 125
3. But if the defendant had not admitted the sufficiency of the obligors, could the judge, at the circuit, have decided upon it? *Quere.* *ib.*
4. It is too late, after trial, to move that the lessors of the plaintiff in ejectment, who were infants, file security for costs, *nunc pro tunc*. *Jackson, ex dem. Erving and others, v. Bushnell*, 330
5. In an action of debt on a bond, for the penal sum of 500 dollars, conditioned to abide the award of arbitrators, judgment in form being entered up for the plaintiff for the penalty, though the jury assessed the damages to thirteen dollars only, the plaintiff was held entitled to recover his full costs. *Godfrey v. Van Cott*, 345
6. The judgment is the test by which the right to costs is determined. *ib.*

II. *Costs in particular actions, and in actions by and against particular persons.*

7. In a special action on the case for erecting a nuisance, the plaintiff having recovered forty-five dollars only, and there being no certificate of the judge that the title to land came in question, it was held that the plaintiff could not recover costs, but must pay costs to the defendant. *Ross v. Dole*, 306
8. But the plaintiff was allowed to set off the damages recovered against the costs, notwithstanding any lien which the defendant's attorney claimed to have on the costs. *ib.*
9. It is too late, after trial, to move that the lessors of the plaintiff in ejectment, who were infants, file security for costs, *nunc pro tunc*. *Jackson, ex dem. Erving and others, v. Bushnell*, 334
10. If, in an action of slander, commenced in a Court of common pleas, and removed into this Court by *habeas corpus*, the plaintiff here recovers less than fifty dollars damages, he is entitled to no more costs than damages, (1 *N. R. L.* 344. *mess.* 36. ch. 96. sect. 37.) *Waterman v. Van Benschoten*, 425
11. The privilege of counsellors and attorneys being taken away, (except during the actual sitting of the Court,) by statute, (1 *N.*

*R. L. 416, sess. 36, ch. 92, sect. 12.*) so that they may be arrested and held to bail like other persons, they stand on the same ground, also, in respect to costs; and if sued by bill, during term, and less than 50 dollars is recovered, they are not liable for costs. *Foster and another v. Garney*, 465

Costs in error, *vide* Error, 3.

#### COVENANT.

1. In an action of covenant by a grantee, who has been evicted on the covenants in his deed, the damages which he is entitled to recover, are the consideration money, with interest for such time as he is liable for the mesne profits, and the costs of the ejectment suit against him. *Bonnet v. Jenkins and others*, 50
2. Where a grantor covenanted that the grantee should peaceably and quietly hold the premises, without any let, suit, &c., of the grantor, or of any person lawfully claiming under him, and that free from all former encumbrances, of what nature or kind soever, made by the grantor, it was held that a judgment against the grantor, outstanding at the time of executing the deed, was a breach of the covenant, and that the grantee, having satisfied the judgment, without waiting until he was evicted, was entitled to recover the amount paid from the grantor. *Hall v. Dean*, 105
3. A recovery in ejectment against the covenantor, is not a breach of the covenant for quiet enjoyment; but there must be an actual ouster by writ of possession. *Kerr v. Shaw and Shaw*, 236
4. A covenant in a lease, on the part of the lessor, to let the lot, at the expiration of the term, to the lessee, without mentioning any price for which it was to be let, is not a covenant for a perpetual lease, or for a perpetual renewal of the lease, and can, at best, be extended to a single renewal for the time for which the original lease was given. *Abel v. Radcliff*, 297
5. But it is not capable even of the latter construction, and is altogether void for uncertainty. *ib.*

*Vide* ACTION OF THE CASE, 5.

Covenant to convey, *vide* AGREEMENT, 7.

#### COUNSEL.

When a competent witness, *vide* EVIDENCE, IV. 28, 29.

#### COURT MARTIAL.

*Vide* MILITIA, 2.

#### COURTS OF COMMON PLEAS.

- A Court of common pleas may compel a plaintiff to be nonsuited against his consent, when, in their opinion, the evidence offered by him is not sufficient to support his action, there being no question of fact to be decided. *Pratt v. Hull*, 334

494

Suits on recognizances of bail, or bail-bonds in, *vide* BAIL, 5.

Bill of exceptions in, *vide* BILL OF EXCEPTIONS, 2, 3

*Vide* ALBANY.

#### COURTS OF JUSTICES OF THE PEACE.

- I. Jurisdiction.
- II. Process, appearance, and default.
- III. Declaration, pleadings, issue, and set-off
- IV. Adjournment.
- V. Jury, trial, evidence, and verdict.
- VI. Discontinuance, and other irregularities, and when waived.
- VII. Judgment.
- VIII. Execution.
- IX. Evidence of proceedings before a justice.

##### I. Jurisdiction.

1. Whether it is a valid objection to a justice of the peace, trying a cause, that one of the parties is his son-in-law? *Quere. Pierce v. Sheldon*, 191
2. An action against a constable for not serving or returning an execution in a justice's Court, must be debt; if the action be brought in any other form, the judgment will be reversed. *ib.*
3. A justice of the peace, who, in fact, keeps a tavern, although he has no license for that purpose, is disqualified from trying a cause. *Clayton v. Per Dun*, 218
4. And it is immaterial whether the suit was instituted before, or after, he commenced keeping tavern. *ib.*
5. Appearing and going to trial will not, in such case, confer jurisdiction on the justice. *ib.*

*Vide* CERTIORARI TO A JUSTICE'S COURT, 1

##### II. Process, appearance, and default.

6. The security required to be given by a non-resident plaintiff, in commencing an action before a justice of the peace, by a warrant, may be a deposit of money with the justice. *Wheolock v. Brinckerhoff*, 481
7. And where, in an action of trespass, five dollars were deposited as security, it was held sufficient. *ib.*

##### III. Declaration, pleadings, issue, and set-off.

8. Where an improper set-off has been admitted in a cause in a justice's Court, and tried, the record in such former action is a bar to an action brought on the subject of such set-off. *M'Lean v. Hagarin*, 184
9. A set-off is not admissible in a justice's Court in an action founded on tort. *Dy-gert v. Coppernoll*, 410
10. Where an attorney is sued in a justice's Court, jointly with another defendant, he cannot plead in abatement, that the Court, of which he is an attorney, is then sitting. *Tiffany v. Driggs and Lynch*, 253
11. Where an attachment has been issued under the twenty-five dollar act, and judg-

ment obtained thereon, and afterwards the defendant, in that attachment, brings an action against the plaintiff, the latter cannot set off such judgment, it being presumed to have been satisfied by the property taken under the attachment. *Miller v. Starks*, 517

IV. *Adjournment.*

12. The admission of the affidavit of any other person than the party himself, for the purpose of obtaining a second adjournment, on account of the absence of material witnesses, rests in the sound discretion of the justice; and if it does not appear that that discretion has been abused, his judgment will not be reversed. *Killmer v. Cray*, 228
13. Where an adjournment has been granted, in a justice's Court, and a day for trial agreed on by the parties, one of them is not thereby concluded, on showing sufficient cause, from asking for a second adjournment. *Smith v. Chase*, 462

V. *Jury, trial, evidence, and verdict.*

14. A venire in a justice's Court must be executed by a constable of the town from which the jury is summoned, and in which the cause is tried. *Lono v. Davis*, 227
15. But it seems that a venire directed to any constable of the county, if executed by the proper constable, is a mere defect in form, for which the judgment will not be reversed. *ib.*
16. The jury, in a justice's Court, cannot find a special verdict; nor can the justice render any judgment on such verdict. *Wylie v. Hyde and Hyde*, 249
17. Improper evidence should not be admitted to go to the jury; and it is not sufficient, afterwards, to direct them to disregard it. *Penfield v. Carpenter*, 350
18. A justice cannot deliberate, privately and apart from the parties, with the jury, in a trial before him, unless with the consent of the parties, which consent cannot be inferred from their silence, but must be made to appear affirmatively, otherwise the judgment will be reversed. *Taylor v. Batsford*, 487
19. Where improper testimony is produced by one of the parties, and afterwards legal testimony of the same fact is produced by the opposite party, the error is cured. *Miller v. Starks*, 517

VI. *Discontinuance and other irregularities, and when waived.*

20. Where a justice, in a cause before him, suspended the trial, after it had been commenced, for 20 hours, in order to allow one of the parties to produce further proof, it was held an abuse of discretion, and a sufficient ground for reversing the judgment. *Green v. Angel*, 469
21. Where the trial of a cause before a justice has, after being commenced, been suspended for a time, and when resumed, the plain-

tiff does not appear, it is a discontinuance, and the justice cannot proceed with the trial. *ib.*

VII. *Judgment.*

22. In a judgment, for a defendant, in a justice's Court, it is improper to include costs which accrued on the part of the plaintiff. *Penfield v. Carpenter*, 350
23. In a judgment for the plaintiff, for costs, the costs of subpoenas issued on behalf of the defendant, cannot be included. *Bronson v. Mann*, 460

VIII. *Execution*

24. An action against a constable for not serving, or returning, an execution in a justice's Court, must be debt: if the action be brought in any other form, the judgment will be reversed. *Pierce v. Sheldon*, 191
25. The priority of executions, in a justice's Court, depends not on the time of delivering the execution to the constable, but on the time of actual levy. *Wylie v. Hyde and Hyde*, 249
26. It is sufficient if a constable levy on an execution, and advertise within 20 days after he has received the execution, but sells after the expiration of the 20 days, provided the sale were made before the return day of the writ; and such sale will be valid against an intermediate levy and sale on another execution. *ib.*
27. And the advertisement may be made on a day subsequent to the levy, provided both were within the 20 days. *ib.*
28. A person who has a family, but is not a freeholder, is exempted from imprisonment on an execution issuing out of a justice's Court, although he resides in a different county from that in which the judgment was rendered. *Spafford v. Griffen*, 328
29. But the justice's refusal to endorse the defendant's exemption on the execution, is no ground for reversing the judgment. *ib.*
30. Where an execution is issued out of a justice's Court, against the body of a defendant, although the constable has 30 days within which to serve it; yet, if he arrests him during that time, it will be an escape to suffer him to go at large, which will not be excused by his having the defendant in custody at the expiration of the 30 days. *Pulver v. McIntyre*, 503

IX. *Evidence of proceedings before a justice.*

31. Parol evidence is inadmissible to contradict the certificate of a justice as to proceedings before him. *M'Lean v. Hugarin*, 184
32. Where the return to a *certiorari* stated the certificate of a justice of a former trial, authenticated according to the act, but not appearing to be under the seal of the C. P., otherwise than that the clerk had stated *witness my hand and seal*; it was held that it was to be inferred that it was under seal. *ib.*
33. Where, on the plea of a former judgment,

in which the present plaintiff, being defendant, ought to have set off his demand, the justice, by whom that judgment was rendered, appears as a witness, and produces his minutes of the judgment, in which there is an ambiguity as to the form of the action, the evidence of the justice is inadmissible to show that the action was founded on contract, if it appears that he has in his possession the original written declaration, which is evidence of a higher nature.

- Dyert v. Coppernoll*, 210  
 34. It is sufficient evidence of a judgment recovered before a justice of the peace who is since dead, for the party to prove the death of the justice, and to produce the original minutes of the judgment in the hand-writing of the justice, with proof to verify those minutes. *Baldwin v. Prouty*, 430

#### CRIMINAL PROCEEDINGS.

*Vide* INDICTMENT, JUDGMENT, II. LARCENY.

#### CUSTOM-HOUSE OFFICERS.

*Vide* EVIDENCE, I. 2. 4.

### D.

#### DAMAGES.

An admission, by the counsel of the plaintiff, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages; and, therefore, evidence on the part of the defendant, in the nature of justification of the act, is inadmissible by way of mitigation of damages. *Hoyt v. Gelston and Schenck*, 141

*E. P. Gelston and Schenck v. Hoyt* in error, 561

Mitigation of damages, *vide* ASSUMPSIT FOR GOODS SOLD.

In an action on a bill of exchange, *vide* BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 8, 9.

Damages of grantee on eviction, *vide* COVENANT, 1.

*Vide* ACTION ON THE CASE, 8.

#### DAMAGE FEASANT.

*Vide* DISTRESS.

#### DEBT.

Debt is the only form of action against a constable for not returning an execution in a justice's Court. *Pierce v. Sheldon*, 191

#### DEBTOR.

Insolvent, *vide* INSOLVENT.

Imprisoned, *vide* PRISONERS.

#### DECEIT.

*Vide* ACTION ON THE CASE, 2, 3. 5, 6, 7, 8.  
 ASSUMPSIT FOR GOODS SOLD.

#### DECREE IN REM.

*Vide* EVIDENCE, I. 2. 6.

### DEED.

- I. Execution, delivery, and construction of deeds
- II. When void.

#### I. Execution, delivery, and construction of deeds.

1. The grant of an undivided moiety, or share, in a stream of water, does not authorize the grantee to appropriate, or use, the stream to the injury of others jointly interested in it. *Vandenburgh v. Van Bergen*, 212
2. An agreement to convey, containing words of bargain and sale *in presenti*, does not transfer the title. *Joes v. Joes*, 235
3. Where a deed is delivered as an escrow, and either of the parties dies before the condition is performed, and afterward the condition is performed, the deed is valid, and takes effect from the first delivery. *Ruggles v. Lawson and others*, 285
4. Where *A.*, having executed a deed of lands, in consideration of natural love and affection, to two of his sons, and delivered it to *C.*, to be delivered to his sons, in case *A.* should die without making a will; and *A.* having died without making a will, *C.* delivered the deed to the sons; held, that this was a valid deed, and took effect from the first delivery. *ib.*
5. A grant of certain lands, describing them, and all other the lands of the grantor in the province of New-York, passes all other lands of which he was seised in the province of New-York, without any specification. *Jackson, ex dem. Livingston, v. Delancy*, 537
6. But in a sheriff's deed, nothing will pass under such general clause. *ib.*
- S. P. Jackson, ex dem. Carman and others, v. Roosevelt*, 97

Execution by attorney, *vide* AGENT, 2, 3, 4.

Proof of acknowledgment, *vide* EVIDENCE, II. 22.

Registry of deeds, *vide* EXECUTION, 13, 14.

#### II. When void.

7. A sheriff's deed to a purchaser, under an execution, describing the premises sold, no otherwise than as all the lands and tenements of the defendants, situate, lying and being in the Hardanburgh patent, in void for uncertainty. *Jackson, ex dem. Carman and others, v. Roosevelt*, 97
- Vide Jackson, ex dem. Livingston, v. Delancy*, 537
8. Possession of land by a purchaser, under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor; and a subsequent deed executed by them, during such adverse possession, is inoperative and void, and subsequent releases by them to the grantor of the defendant, or the person under whom he derives title, enure to the benefit of the defendant. *Jackson, ex dem. Preston and others, v. Smith*, 405

9. A person in possession of land, claiming title, may purchase in an outstanding title to protect that possession. *ib.*

*Vide* EJECTMENT, I. 11. FRAUDULENT SALES AND CONVEYANCES. GRANTOR AND GRANTEE. PARTITION, 4. TRUST AND TRUSTEE, 1.

### DESCENT.

1. Where *A.* is seized of a reversion expectant, on the determination of a life estate of a tenant by the courtesy, as son and heir of *B.*, the wife of the tenant by the courtesy, and in whom was the fee of the land, *A.* does not become a new *stipes*, or stock, of descent; but a person claiming the reversion must deduce his title immediately from *B.*, the person who was last actually seized in fee of the land. *Bates v. Shraeder*, 260
2. Therefore, the eldest son of the eldest uncle of *A.* will not inherit, but the brothers and sisters of *B.*, and their representatives, are the next heirs, according to the provision of the statute of descent. *ib.*

### DEVISE.

1. One hundred acres of land, in a certain patent, were devised to *M.*, where she pleased to take the same, and to her heirs and assigns, forever; it was held that no title to any particular part of the patent vested in *M.*, and she not having made any election in her lifetime, the right of election was gone, and could not be exercised by her heirs, especially after a lapse of 40 years from the death of the devisee. *Jackson, ex dem. Valkenburgh, v. Van Buren*, 525
2. *M.* devised to his son the farm on which *he then lived, being in, &c., containing, &c.*; held, that under this devise, a lot of about 16 acres, with a dwelling-house thereon, not adjoining the farm, and which had been let out for many years as a separate and distinct lot, did not pass. *Jackson, ex dem. Harder and others, v. Moyer*, 531
3. Under a devise of all the real and personal estate of the testator, the devisee takes a fee in the realty. *Jackson, ex dem. Livingston, v. Delancy*, 537
4. Trust estates, under which is included the interest of a mortgagee, who, until foreclosure, is a trustee for the mortgagor, will pass under general words in a will, relating to the realty, unless it can be collected from the expressions in the will, or the purposes and objects of the testator, that his intention was otherwise. *ib.*

### DEVISE, (EXECUTORY.)

In a devise of all the real and personal estate of the testator, and if the devisee should die without disposing of it, then to *D.*, this subsequent limitation is void; because the first devisee took a fee by virtue of the word *estate*, and because the subsequent limitation was repugnant to the power given to the first devisee. *Jackson, ex dem. Livingston v. Delancy*, 537

### DISSEISIN.

Where a person enters upon land without title, and the tenants surrender their possessions, and attorn to him, this is not a disseisin, or ouster. *Jackson, ex dem. Livingston, v. Delancy*, 537

### DISTRESS.

1. If a person impound beasts, taken damage feasant before the damages have been ascertained by the fence-viewers, he is liable to an action of trespass by the owner. *Merrit v. O'Neil*, 477
2. And it is no defence to such action, that the owner of the beasts is himself the pound-master, if the distrainer has actually put them into his custody as pound-master. *ib.*
3. Whether it would be a defence, if they had not been delivered to the owner as pound-master? *Quare. ib.*
4. Right to distrain not extinguished by an unsatisfied judgment for the rent. *Chipman v. Martin*, 240

*Vide* RENT, 1, 2.

### DISTRIBUTION.

Of intestates' effects, *vide* ALIEN.

### DISTRICT COURT.

Conclusiveness of sentence, *vide* EVIDENCE, I 2. 4. 6.

### DIVORCE.

*Vide* BARON AND FEME.

### DOWER.

1. The widow is entitled to dower in land aliened by the husband during the coverture, to one third of the value of the lands at the time of alienation. *Shaw v. White*, 179
2. The value must be ascertained either by the sheriff on the writ of seisin, or by a writ of inquiry founded on proper suggestions. *ib.*

### E.

### EJECTMENT.

- I. Title of the parties.
- II. Notice to quit.
- III. Practice and proceedings in ejectment.
- IV. Action of trespass for the mesne profits.

#### I. Title of the parties.

1. A person who has entered by permission of one tenant in common, cannot, a partition having been made, set up an adverse title in bar of an action of ejectment by the tenant in common to whose share the premises had fallen. *Jackson, ex dem. Fisher, v. Creal and Kellogg*, 116
2. An entry under claim and color of title, is sufficient to constitute an adverse possession, and it is not necessary that it should be a legal and valid title. *Jackson, ex dem. Young and others, v. Ellis and White*, 118

3. *A*, claiming title to land by descent, made a parol gift of the same to *B.*, under which *B.* entered, and afterwards *A.* conveyed the land to *B.*: it was held, that if the deed related back to the entry of *B.*, there was an adverse possession commencing in *B.*, and if it did not, still, as *B.*, by virtue of the parol gift, became the tenant at will of *A.*, and his possession was to be deemed the possession of *A.*, there was an adverse possession commencing in *A.* *Jackson, ex dem. Young and others, v. Ellis and White,* 118
4. Where a person, having recovered a judgment in ejectment, neglects to enforce it within the period laid in his demise, his right of entry under that judgment is altogether gone; and if there has been an adverse possession for 20 years, during which such judgment was recovered, it will not avail him to take the case out of the statute of limitations. *Jackson, ex dem. Beekman and others, v. Haviland,* 229
5. Where a person, having no title to land, conveys to another, and afterwards purchases a title to the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired will enure to the benefit of his grantee and the confirmation of his title. *Jackson, ex dem. Stevens, v. Stevens,* 316
6. Where a person, who recovers in an action in ejectment, takes possession, and conveys the land to a third person for a valuable consideration, who enters, such entry and possession afford strong *prima facie* evidence of right. *Jackson, ex dem. Klock and others, v. Richtmyer,* 367
7. Where the defendant having purchased a lot of land, and received a deed for the whole lot, in which the grantor stated himself to be the heir of the patentee, and he entered into possession under that deed, and it afterwards appeared that the grantor had title to one ninth part of the lot only, as tenant in common, this was held not to alter the character of the defendant's possession, so as to prevent its being adverse; but that he must be deemed to have entered under his deed, as sole owner in fee of the whole lot. *Jackson, ex dem. Preston and others, v. Smith,* 406
8. Possession of land by a purchaser under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor; and a subsequent deed executed by them, during such adverse possession, is inoperative and void, and subsequent releases by them to the grantor of the defendant, or the person under whom he derives title, enure to the benefit of the defendant. *ib.*
9. A person in possession of land, claiming title, may purchase in an outstanding title, to protect that possession. *ib.*
10. A fine and five years' non-claim are conclusive evidence of title in the cognizee against all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered during the five years without title. *Jackson, ex dem. Watson, v. Smith,* 423
11. Where land was conveyed, and the grantee entered into possession, and, afterwards, proceedings were had in partition in relation to the same premises, to which the grantee was not a party, and the premises were sold by commissioners appointed by the Court, and conveyed by them to the purchaser, it was held, that the first grantee was not precluded, by the proceedings in partition, from controverting the right of the subsequent purchaser, and that, the possession being adverse, the deed from the commissioners was void. *Jackson, ex dem. Smith, v. Freeman,* 488
12. *A.*, being the owner of certain lands in the *Lunenburg* patent, died after having devised the same to his wife during her widowhood, remainder to *B.* and his other three brothers; a dispute having arisen between *C.*, the daughter of *B.*, and her husband, and the other devisees of *A.*, as to the portion of land to which she was entitled, her portion was ascertained and conveyed, in 1772, to her husband; and certain persons were appointed by the deed to locate and reduce to severalty her share, on any of the lands within the patent in the possession of the parties of the first part, or their tenants: the defendant entered upon the premises in question 23 years before the trial, claiming title under the husband of *C.*, and, in an action of ejectment by persons claiming under *A.*, it was held, that there was such an adverse possession in the defendant as barred the action, which could not be repelled by showing that he had obtained his possession from the tenants of the lessors of the plaintiff, or their ancestors, as it was to be presumed, after such a lapse of time, that the persons appointed to locate the share of *C.* had located it upon lands in the possession of tenants, as they were authorized to do. *Jackson, ex dem. Livingston and others, v. Hallenbeck,* 499
13. *A.* entered into possession of land under a lease in fee, in 1775, and in 1778 gave the land to *B.* by parol, who continued in possession, claiming under the lease until 1798, excepting the period of the war, and a year or two after, and *B.* conveyed the premises to *C.*, and *C.* to *D.*, who conveyed the same to the defendant; it was held, that this was a sufficient adverse possession to bar an action of ejectment by the person having title to the land, commenced in 1807. *Jackson, ex dem. Colden and others, v. Moore,* 513
14. Where an adverse possession begins to run in the lifetime of the ancestor, and the land descends to an infant heir, the latter is not protected by his disability. *ib.*



15 *A.*, in 1770, being indebted to *B.* by three several bonds, in order to secure the payment of the same, executed to *B.* a mortgage of all his lands, in the province of *New-York*, part of which lands were referred to by name, and part, comprising the premises in question, passing under a general clause, and covenanted, that, on default, the mortgagee, his heirs, &c., might enter. *B.* died, having directed, by her will, all her estate, in certain patents and elsewhere, *wheresoever and whatsoever*, to be turned into money by her executors, and to be equally divided among her five children, who were to be *tenants in common in fee of the realty*, until such sale and distribution. In 1771, before the death of *B.*, the mortgage had become forfeited, and a judgment had also been recovered by *B.* against *A.* *A.*, by his will, executed in 1780, devised his estate to his wife, and in case of her death without disposing of the same by grant or devise, he devised it over to his daughter *D.* In 1788, the judgment against *A.* was revived by the executors of *B.*, and a *scire facias* was directed to the heirs of *A.*, but not to the wife of *A.*, the tenant of the land, who was not summoned, and execution was issued thereon, and the lands of *A.* sold, and purchased by *C.*, who had married one of the daughters and devisees of *B.*, and conveyed to him, who took possession of the premises under that deed; which, however, it was now admitted, did not pass the premises. *C.* procured conveyances from three of the other devisees of *A.*, and the tenants of the land, in 1790, attorned to *C.*, and surrendered their possession to him, and agreed to hold under him. The wife of *A.* having died, after devising her estate to trustees, in trust for her daughter *D.*, it was held, in an action of ejectment on the demise of *D.*, against persons claiming under *C.*, that *C.* had a right of entry under the will of *B.*, as devisee of the mortgage which passed by the general words of the will, such appearing to be the intention of the testatrix, and which the defendants could set up as an outstanding title to defeat the plaintiff's action; and that the adverse possession of the defendants was not repelled by *D.*'s not having a right of entry until the determination of the previous estate, the executory devise to *D.*, in the will of *A.*, being repugnant and void. *Jackson, ex dem. Livingston, v. Delancy,* 537

16. Where a person enters upon land without title, and the tenants surrender their possessions, and attorn to him, this is not a disseisin or ouster, and the attornment is void; such entry and attornment are not the commencement of an adverse possession. *ib.*

Ejectment by purchaser under execution, *vide* Execution, § 10.

*Vide* JUDGMENT, I. 1. ESTOPPEL, 2. NEW TRIAL.

## II. Notice to quit.

17. A notice to quit is only necessary where the relation of landlord and tenant subsists between the parties. *Jackson, ex dem. Phillips, v. Aldrich,* 106
18. Where *A.* conveys land to *B.*, and *B.* conveys the same land to *C.*, but *A.* still continues in possession, *C.* may bring an action of ejectment against *A.*, without giving him notice to quit, there being no relation of landlord and tenant subsisting between them. *ib.*

## III. Practice and proceedings in ejectment.

19. It is too late, after trial, to move that the lessors of the plaintiff, who were infants, file security for costs, *nunc pro tunc.* *Jackson, ex dem. Erving and others, v. Bushnell,* 330
20. The lessor in ejectment may enter after judgment without a writ of possession; and the judgment is evidence of his right of entry, between the parties and privies, so as to protect him against an action of trespass, so long as the effect of the judgment continues. Per *Platt, J. Jackson, ex dem. Beckman and others, v. Haviland,* 229
21. But after the expiration of the demise laid in his declaration, he cannot proceed to enforce his judgment. *ib.*

## IV. Action of trespass for the mesne profits.

22. When, during the pendency of an action of ejectment, the defendant gives up the possession to a third person, and afterwards the plaintiff recovers judgment, such third person is liable for the mesne profits: the recovery in ejectment is conclusive evidence against him, and he cannot set up a title in himself as a bar. *Jackson v. Stone,* 447

## ELECTION.

1. *A.* executes certain promissory notes to *B.*, and procures land, of which he is the *cestuy que trust*, to be conveyed to *B.* under an agreement that *B.*, on the payment of the notes, should reconvey the land; the notes not being paid, and *B.* having exercised acts of ownership on the land, by selling, &c., he cannot support an action on the notes, there being a failure of consideration, and the agreement being void on the non-payment of the notes, if *B.* elected so to consider it; and by exercising acts of ownership, he had determined his election, and had a complete title to the land. *Winter v. Livingston,* 54
2. Where a grant is made of a right of election, without giving any present interest before election, election must be made in the lifetime of the parties, and does not descend to the heirs of the grantee. *Vandenburgh v. Van Bergen,* 712

3. *A.*, in 1734, granted to *B.* a certain saw mill, on the *Cozackie* creek, with the ground and stream of water thereunto belonging; and also the full liberty and license to erect and build another mill on any other place, at or on the same creek, with like liberty of ground and stream of water; held, that though *B.*, in his lifetime, would have had a right to have erected a mill on the creek, and to have overflowed, so far as was reasonable and necessary, the land of *C.*, adjacent to the creek, and subsequently purchased of *A.*, yet that *B.* never having elected a place for another mill, or exercised his right to erect such other mill, during his lifetime, it became extinct at his death; and the right could not be claimed or exercised by his heirs, or assigns; the privilege, or election, not being coupled with an interest, so as to vest absolutely at the time of the grant. *Vandenburgh v. Van Bergen*, 212
4. One hundred acres of land, in a certain patent, were devised to *M.*, where she pleased to take the same, and to her heirs and assigns forever. It was held that no title to any particular part of the patent vested in *M.*, and she not having made any election in her lifetime, the right of election was gone, and could not be exercised by her heirs, especially after a lapse of 40 years from the death of the devisee. *Jackson, ex dem. Valkenburgh, v. Van Buren*, 525

*Vide ESCAPE*, 1, 2, 3.

#### ELECTORS OF GRAND ASSIZE.

Their fees, *vide* COSTS, I. 1.

#### ENEMY.

*Vide* ALIEN.

#### ENTRY.

- A party having title may enter peaceably, without judgment or suit; and, having so entered, without force, his possession enures according to his title. *Per Platt, J. Jackson, ex dem. Beekman and others, v. Haviland*, 235

#### ERROR.

1. A judgment may be reversed in part only; thus it may be affirmed as to the debt, and reversed as to the costs. *Bronson v. Mann*, 460
2. Where the record is made up, a general assignment of errors to a bill of exceptions is sufficient. *Shepard v. Merrill*, 475
3. The 14th section of the act concerning costs, (1 N. R. L. 346.) giving double costs on the affirmance of a judgment on error, applies only where the writ of error is brought by the defendant in the Court below: if the plaintiff below brings a writ of error, and the judgment is affirmed, he is entitled to single costs only. *Jackson, ex dem. Livingston, v. Delancy*, 537
4. When the plaintiff, in the Supreme Court,

demurs to the defendant's pleas, who joins in demurrer, and, the cause being called on, the defendant's counsel declines arguing the demurrer, and judgment is, of course, given for the plaintiff, the defendant cannot, on bringing a writ of error, object to the propriety of the judgment which they had thus passed against him by default. *Gelston and Schenck v. Hoyt*, 561

5. No point can be raised in a Court of appellate jurisdiction which was not argued in the Court below. *ib.*
6. Where a writ of error is brought on a judgment for the plaintiff, in an action for a tort, and the judgment is affirmed, the defendant in error will not be allowed interest on the judgment. *ib.*

#### ESCAPE.

1. Where a plaintiff brings an action against a sheriff for the escape of a prisoner in execution, the plaintiff's election to consider him as out of custody is thereby determined, and he cannot resort to a remedy which would be an acknowledgment of his being in custody. *M'Elroy v. Mancius*, 121
2. Therefore, after bringing an action against the sheriff for an escape, he cannot oppose the discharge of the prisoner under the act for the relief of debtors, with respect to the imprisonment of their persons. *ib.*
3. The sheriff cannot avail himself, as a defence, of the acts of the plaintiff, subsequent to the suit commenced, recognising the prisoner to be still in custody; such recognition being inoperative, as the plaintiff, by suing the sheriff, has determined his election. *ib.*
4. Where, an officer having a defendant in execution, *A.* promised that, if the officer would release the defendant, he would pay the amount of the execution if he failed to re-deliver him to the officer on a certain day, and the officer, accordingly, released him, it was held that this was a voluntary escape, and that the officer could maintain no action against *A.*, on the non-performance of his promise. *Wheeler v. Bailey*, 366
5. It is no defence to an action, for the escape of a defendant in execution, that the *ca. ss.* had been irregularly issued; as, without issuing a previous *f. fa.* *Scott v. Shaw*, 378
6. *S. P. Hinman v. Brees*, 539
6. Where an execution is issued out of a justice's Court against the body of a defendant, although the constable has thirty days within which to serve it, yet, if he arrests him during that time, it will be an escape to suffer him to go at large, which will not be excused by his having the defendant in custody at the expiration of the thirty days. *Pulver v. McIntyre*, 503
7. In an action of debt against a sheriff for the escape of a prisoner in execution, on a *ca. ss.*, parol evidence is admissible to show the issuing of the execution, its de-

very to the sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa.*, and having refused to produce it at the trial, though due notice, for that purpose, had been given to him before trial. *Hisman v. Broes*, 529

8. It is the duty of the sheriff to return a writ without a rule of Court for that purpose; and he cannot avail himself of his neglect of duty to defeat the plaintiff's action. *ib.*
9. Where, on a judgment in a bailable action, a *ca. sa.* is issued without a *fi. fa.* having been previously issued, and returned *nulla bona*, pursuant to the statute, the sheriff, in an action against him for an escape, cannot avail himself of the irregularity; but application must be made to the Court to set aside the *ca. sa.* on the ground of such irregularity. *ib.*

#### ESCROW.

*Vide* DEED, I. 3, 4.

#### ESTOPPEL.

1. Where a person, having no title to land, conveys to another, and afterwards purchases a title to the same land, he is estopped from maintaining an action against his grantee for the land, but the title subsequently acquired will enure to the benefit of his grantee, and the confirmation of his title. *Jackson, ex dem. E. Stevens, v. F. Stevens*, 316
2. Where land is purchased under a junior judgment, by an agent who takes a deed from the sheriff to himself, and then conveys the land to his principal, the agent, or trustee, is not thereby estopped from levying on the same land under a senior judgment, and purchasing it himself. *Jackson, ex dem. Whitlock, v. Mann*, 462

#### EVIDENCE.

- I. *Matter of record, and proceedings of Courts.*
- II. *Written evidence, and parol evidence in relation thereto.*
- III. *Presumptions.*
- IV. *Competency of witnesses.*
- V. *Credibility of witnesses.*
- VI. *Examination of witnesses.*
- VII. *Evidence in particular cases, and under particular issues.*

##### I. *Matter of record, and proceedings of Courts.*

1. The judgment of a Court of competent jurisdiction, upon matter of which it has cognizance, cannot be impeached collaterally, but it stands firm until vacated or reversed. *Hoyt v. Gelston and Schenck*, 141
2. A sentence of restitution, in the District Court of the United States, of a vessel which had been seized by a collector, is conclusive evidence, in an action of trespass brought by the owner against the collector, that the seizure was illegal. *ib.*

§ P. *Gelston and Schenck v. Hoyt*, in error, 561

3. The judgment, or decree, of a Court of competent jurisdiction, binds only parties, or privies. *Gelston and Schenck v. Hoyt*, 561

4. Where a vessel is seized, as forfeited, by the surveyor of the port, under orders from the collector, and is libelled in the District Court, the surveyor and collector are privies, as it is to be presumed, nothing appearing to the contrary, that the seizure was made in consequence of information given by them to the government; and they are bound by the decree of the District Court; but if they are not informers, yet they are privies by virtue of their office and act of seizure. *ib.*

5. A decree against the principal binds the agent, who must look to the principal for indemnity. *ib.*

6. A decree in proceedings *in rem*, of a Court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is binding upon all persons. *ib.*

7. A judgment in another state is to be considered here as a foreign judgment, in every respect, except in the mode of proving it: it is only *prima facie* evidence of a debt, and may be impeached as unjust, or unfair, or irregular. *Pauling and wife v. Wilson and Smith*, 192

8. And such judgment, when founded on proceedings by attachment, against the goods of the defendant, he not being within the jurisdiction of such state, is not even *prima facie* evidence of a debt. *ib.*

9. A recovery against the vendee, by the rightful owner of a chattel, is conclusive evidence in an action by the vendee against the vendor. *Barney v. Dewey*, 224

10. If the plaintiff, on trial, waive any particular cause of action, and afterwards bring a new suit for the same cause, the record, in the former action, is not a bar to the new suit. *Lowe v. Davis*, 227

11. Where parol evidence of a judgment has been offered by one of the parties, and improperly admitted, and the opposite party afterwards produces the judgment itself, the error is cured. *Miller v. Starks*, 517

12. In an action of debt against a sheriff, for the escape of a prisoner in execution, on a *ca. sa.*, parol evidence is admissible to show the issuing of the execution, its delivery to the sheriff, and the arrest of the party thereon; the defendant having neglected to return and file the *ca. sa.*, and having refused to produce it at the trial, though due notice, for that purpose, had been given to him before trial. *Hisman v. Broes*, 529

Evidence of proceedings in a justice's Court,  
*vide* COURTS OF JUSTICES OF THE PEACE, IX

*Vide* COURTS OF JUSTICES OF THE PEACE,  
III. 8.

##### II. *Written evidence, and parol evidence in relation thereto.*

13. Notarial copies of instruments executed in

- a foreign country, are not, in themselves, evidence. *Mauri v. Heffernan*, 53
14. But where the defendant entered into an obligation with the plaintiff, as his surety, at *Caracas*, which not being performed, the plaintiff, the surety, was compelled, by proceedings at law, to pay the amount for his principal; in an action by the surety, against the principal, it was held, that a copy of the obligation, (which, according to the laws of the Spanish colonies, was made before a notary, who kept the original, and delivered copies to the parties,) authenticated according to the laws of Spain, connected with evidence that the original could not be procured, and with proof of admissions, by the defendant, of its authenticity, and of the breach of the contract, was sufficient without producing the decree against the plaintiff, and the original obligation, or a sworn copy of it. *ib.*
15. The execution of an instrument, not under seal, may be proved by the admissions of the defendant. *ib.*
16. Where the form of the action gives the defendant notice to be prepared to produce an instrument, if necessary, to falsify the plaintiff's evidence, the plaintiff need not give the defendant notice to produce it. *The People v. Holbrook*, 90
17. So, on the trial of an indictment for stealing a bank bill, note, &c., under the statute, (1 N. R. L. 174. sess. 24. ch. 38) parol evidence of the contents of the bills, or notes, stolen, is admissible without accounting for their non-production. *ib.*
18. A notice may be proved by parol, or by producing a copy made by the witness at the time of making the original; and it is not necessary that notice to produce the original should have been given. *Johnson v. Haight and Mathews*, 470
19. Parol evidence is inadmissible to contradict the certificate of a justice, as to proceedings before him. *M'Lean v. Hugarin*, 184
20. Whether the hand-writing of a maker of an instrument, may be proved by comparing it with writing admitted to be his? *Quere. Olmsted v. Stewart*, 238
21. Where a partition was made in 1764, under the colonial act of 1762, and on the trial, in 1813, the map and field book, which had been filed, pursuant to the directions of that act, were produced in evidence, but the balloting book could not be found; it was held, that after such a lapse of time, and the act of the parties recognizing the partition, it could not be invalidated on account of the want of the balloting book. *Jackson, ex dem. Klock and others, v. Richtmyer*, 367
22. Where *A.* and *B.* were subscribing witnesses to a deed, both of whom were dead at the time of trial, and the hand-writing of *A.* was proved, and, also, that he had signed the name of *B.*, and there were two acknowledgments upon the deed, one of which stated that he and *F.* both signed as witnesses; and the other, and later acknowledgment, stated that *A.* had signed the name of *B.* in his presence, and at his request; it was held, that there was sufficient proof of the execution of the deed, and that the first certificate could only go to impeach the credit of *A.*, which was matter for the jury, on the question whether the grantor had executed the deed or not; but that the reasonable supposition was, that the officer had made a mistake in the form of the certificate. *Jackson, ex dem. Boyd, v. Lewis*, 504
23. In an action of ejectment to recover a lot of land, in the military tract, on the demise of *P. S.*, the plaintiff produced in evidence a patent to *P. S.*, issued in pursuance of the act of the 6th April, 1790, to carry into effect the concurrent resolutions of the legislature for granting certain lands promised to be given as bounty lands, &c. The defendant proved that there was another person of the name of *P. S.* in existence, who was too young, during the revolutionary war, to be a soldier, and that the lessor of the plaintiff had not himself been a soldier during the revolutionary war; and it was held, that upon this evidence the defendant was entitled to judgment. *Jackson, ex dem. Shultz and another, v. Goes*, 513
24. It is competent for a defendant in ejectment to prove that a person claiming as patentee, although of the same name, was not the patentee intended by the grant. *ib.*
- Proof of resulting trust, *vide* TRUST AND TRUSTEE, 4.
- III. Presumptions.
25. Where several persons, being possessed of an undivided tract of land, in 1765 made partition, and conveyed the entire tract to *A.* in trust, to convey to each of the grantors his proportion in severalty, and the land had been since generally held according to that partition, it was held, in an action of ejectment brought in 1807 by a person claiming under one of the parties between whom partition was made, that a conveyance by the trustee in pursuance of the trust was to be presumed. *Jackson, ex dem. Colden and others, v. Moore*, 513
- Vide* EJECTMENT, I. 12. *Ante*, II. 21.
- IV. Competency of witnesses.
26. Where an action was brought by a non-resident plaintiff, and at the trial the plaintiff's attorney was produced as a witness for his client, and was objected to on the ground that no security had been filed for the costs, and that, therefore, he was interested, and a bond was immediately executed, and tendered to the defendant's counsel, who admitted the sufficiency of the obligors, but refused to receive it, and it was then filed with the clerk; it was held, that this was a bond of which the defendant might have availed himself, had

a verdict gone in his favor, or the plaintiff been nonsuited, and that the competency of the witness was restored. *Brandiges v. Hale*, 125

27. But, if the defendant had not admitted the sufficiency of the obligors, could the judge at the circuit have decided upon it? *Quære.* *ib.*
28. An attorney or counsel cannot testify as to communications made by a client, whilst the relation of attorney or counsel and client subsists. *Yordon v. Hess*, 492
29. But if, after that relation has ceased, the former client repeat to his attorney, voluntarily, and without any artifice being used by the latter, communications previously made, the attorney is a competent witness as to such subsequent communications. *ib.*
30. If one of the parties in a suit is sworn and examined, at the request of the other party, the latter cannot afterwards object to it. *Müller v. Starks*, 517

*Vide post*, VI. 34.

*V. Credibility of witnesses.*

31. Testimony to impeach the credit of a witness, by showing that she either was, or had been, a common prostitute, is inadmissible. *Jackson*, ex dem. *Boyd*, v. *Lewis*, 504

*VI. Examination of witnesses.*

32. A witness, either on the *voire dire*, or on cross-examination, is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. *The People v. Herrick*, 82
33. A witness is not bound to answer whether he had been convicted of petit larceny. *ib.*
34. But it seems that the party attempting to exclude him, must produce the record of conviction. *ib.*
35. Improper evidence should not be admitted to go to the jury; and it is not sufficient, afterwards, to direct them to disregard it. *Penfield v. Carpenter*, 350

*VII. Evidence in particular cases, and under particular issues.*

Evidence in mitigation of damages, *vide DAMAGES*.

Evidence in action for mesne profits, *vide EJECTMENT*, IV.

Evidence in an action for not removing an encroachment, *vide HIGHWAYS*, 2.

Evidence to take a case out of the statute of limitations, *vide LIMITATION OF ACTIONS*.

Evidence under *non est factum*, *vide PLEADING*, III. 30.

Evidence under *non-assumpsit*, *vide PLEADING*, VII. 37, 38.

Evidence under not guilty, *vide PLEADING*, VII. 45.

Notice of special matter to be given in evidence, *vide PLEADING*, III. 21, 22, 30.

Variance, *vide PLEADING*, II. 9, 10. VIII.

*Vide COURTS OF JUSTICES OF THE PEACE*, V 17. 19. GRANTOR AND GRANTEE, 2

EXCISE.

*Vide INNS AND INNKEEPERS.*

EXECUTION.

1. A sale under an execution, to a *bona fide* purchaser, cannot be defeated for error or irregularity in the judgment, or execution, or on the ground that no levy was made until after the return-day. *Jackson*, ex dem. *Carman and others*, v. *Rosevelt*, 97
2. An execution issued after a year and a day, without the judgment being revived by *scire facias*, or on an irregular *scire facias*, is voidable only, and cannot be called in question in a collateral action so as to defeat the title of a purchaser under the execution; and it seems, that after the lapse of twenty years, it cannot be avoided on a direct application for that purpose. *Jackson*, ex dem. *Livingston*, v. *Delancy*, 537
3. In a sheriff's deed, nothing will pass under a general clause of "*all other the lands, &c. of the defendant.*" *ib.*
4. In a sheriff's deed, the land sold must be described with reasonable certainty, and he can sell nothing under an execution which the creditor cannot enable him so to describe. *ib.*
5. A sheriff's deed to a purchaser under an execution, describing the premises sold no otherwise than as *all the lands and tenements of the defendants, situate, lying, and being in the Hardenburgh patent*, is void for uncertainty. *Jackson*, ex dem. *Carman and others*, v. *Rosevelt*, 97
6. Where a sheriff has two executions against the same defendant, and having levied part of the amount of the prior execution, proceeds, after the return-day of that execution, to make another levy, he must apply the sum thus made in satisfaction of the junior execution; the latest period which the law allows for the service of a writ being the day on which it is returnable. *Singerland v. Swert*, 255
7. If the plaintiff in the junior execution obtain a rule directing the sheriff to pay over the money to him, he is not bound to proceed by attachment, but may maintain an action of assumpsit against the sheriff. *ib.*
8. And after such rule of the Court, and demand made by the plaintiff to pay him the money, the sheriff, being clearly in default, is chargeable with interest from the time of demand. *ib.*
9. A purchaser of land under a *fi. fa.* at a sheriff's sale has no right to enter on the premises unless they are vacant. *The People v. Nelson*, 34
10. The sheriff can deliver the legal possession; but in order to obtain actual possession, the purchaser must resort to his action of ejectment. *ib.*

11. A *ca. sa.* issued before a *fi. fa.* in an action in which special bail has been filed, is not void, but voidable only at the instance of the party against whom it issued. *Scott v. Shaw*, 378
  12. And in an action for an escape, the sheriff cannot take advantage of the irregularity. *ib.*
  - S. P. *Hinman v. Brees*, 529
  13. A sheriff's deed for lands in the military tract must be recorded; and if, after land has been sold on execution, and a conveyance made by the sheriff, and before such conveyance is recorded, the former proprietor conveys it to a *bona fide* purchaser for a valuable consideration, who has his deed first recorded, such subsequent purchaser will gain a priority. *Jackson, ex dem. Merril, v. Terry*, 471
  14. A special return upon an execution, even if sufficient to pass a title to the land, (which, it seems, it is not,) must, in order to give the purchaser under the execution a priority, be recorded. *ib.*
- Habere facias possessionem, vide EJECTMENT*, III. 20, 21.
- Priority and lien of executions, *vide JUDGMENT*, I.
- Vide ESCAPE.*

#### EXECUTORS AND ADMINISTRATORS.

- A.*, the administrator of an intestate estate, under an order of the surrogate, sold certain land of the intestate, and took a bond and mortgage from the purchaser, to secure the consideration; he afterwards drew an order upon the purchaser, in favor of *B.*, for part of a debt due from his intestate to *B.*, stating, in the order, that the amount should be credited on the bond and mortgage; but the purchaser refused to pay the order, as the bond and mortgage had been assigned to *C.*; it was held, that *A.*, having received the full amount of the bond and mortgage from the assignee, and being credited for the amount of the debt to *B.*, in his account with the surrogate, was liable, in his individual capacity, to *B.*, for the amount of the order as for money had and received to his use. *Noaker v. Hubbard*, 510

*Vide ADMINISTRATION BOND.*

#### EXECUTORY DEVISE.

*Vide DEVISE, (EXECUTORY.)*

#### EXTINGUISHMENT.

1. A judgment, without satisfaction, is not an extinguishment of a collateral remedy for the same cause of action. *Chipman v. Martin*, 240
2. So, an unsatisfied judgment in an action brought for the recovery of rent, does not preclude the plaintiff from distraining for the same rent. *ib.*

#### F.

##### FACTOR.

Where a consignee sells the goods of his principal, under an agreement, made without the consent of his principal, that the amount of the sale should be set off against a debt due from his principal, the consignee, acting beyond the scope of his agency, is liable to his principal for the value of his goods; and if he had directions from the consignor to sell them only at a certain price, which price he obtained by making the before-mentioned agreement, which was more than the ordinary market price, he will be liable according to the rates at which they were sold. *Guy v. Oakley*, 332

##### FEEES.

Of electors of grand assize, *vide COSTS*, I. 1.

Of sheriff, *vide SHERIFF.*

##### FENCE VIEWERS.

*Vide DISTRESS.*

##### FIERI FACIAS.

*Vide EXECUTION.*

##### FINE.

A fine and five years' non claim are conclusive evidence of title in the cognizee against all persons not under any legal disability; and a fine alone is sufficient to support an action of ejectment against a person who has entered, during the five years, without title. *Jackson, ex dem. Watson, v. Smith*, 426

##### FISHING IN THE HUDSON.

Fishing on a Sunday, in the channel of *Hudson's river*, between the city of *New-York* and *Baker's Falls*, is a violation of the act to protect the fishing in *Hudson river*, &c., *secs. 38. ch. 146. sect. 4.* *Sickles v. Sharp*, 497

##### FLOUR.

*Vide INSPECTION.*

##### FORCIBLE ENTRY AND DETAINER.

1. The service of notice of inquiry, in a case of forcible entry and detainer, must be either by affixing a notice, in writing, on some public and suitable place on the premises, as the front door of the house, or by delivering the notice personally to the party against whom the complaint is made, if on the premises. *Forbes and Nelson v. Glasheen*, 185
2. Where the affidavit of service of notice stated, that the party was not on the premises, and that the notice was put upon the house in a conspicuous place, it was held not to be sufficient, and the conviction was set aside, and a re-restitution awarded. *ib.*
3. An indictment for a forcible entry and detainer, under the statute, (*secs. 11. ch. 6. 1 N. R. L. 98.*) must set forth a seisin or possession within the purview of the act

or whether the estate of the relator be a freehold or term of years; and on the traverse, the allegations as to his estate must be proved by the prosecutor. *The People v. Nelson*, 340

4. The defendant cannot justify the force by showing a title in himself: he may controvert the facts by which the prosecutor attempts to show a title in himself. *ib.*
5. A purchaser of land under a *fi. fa.* cannot enter upon the land, being in the actual possession of another, without rendering himself liable to an indictment. *ib.*

#### FOREIGN INTERCOURSE.

*Vide* INDEPENDENT STATE.

#### FOREIGN JUDGMENT.

*Vide* EVIDENCE, I. 7, 8.

#### FRAUD.

*Vide* ACTION ON THE CASE, 2, 3 5, 6, 7, 8.

#### FRAUDS, (STATUTE OF.)

1. If a promissory note payable to bearer, or not negotiable, is endorsed in blank, the holder may write over the name of the endorser a guaranty or promise to pay the note, so as to take the promise out of the statute of frauds; and this may be done at any time, before or at the trial. *Nelson v. Dubois*, 175
2. Where *A.* sold a horse to *B.* at the request of *C.*, and on his promise to guaranty the payment of *B.*'s note for the money; and *B.* gave a note payable to *A.*, or bearer, in 12 months, which *C.* endorsed in blank; this was held to be an original undertaking by *C.* as a surety, who was equally responsible as if he had signed the note with *B.* *ib.*
3. A warranty in a writing, not under seal, for the quiet enjoyment of land, must express the consideration on which it is founded. *Kerr v. Shaw and Shaw*, 236
4. Every agreement which is required to be in writing by the statute of frauds, must be certain in itself, or be capable of being made so by a reference to something else, whereby the terms can be ascertained with reasonable precision, otherwise it cannot be carried into effect. *Abel v. Radcliff*, 297
5. Where, in shipping articles of seamen, a person has signed his name under a column headed "Sureties," but there was no explanation added as to the extent of his undertaking, it is not a sufficient writing within the statute of frauds, and the undertaking is void. *Dodge v. Lean*, 508

#### FRAUDULENT SALES AND CONVEYANCES.

Where land is conveyed between the rendering and docketing the judgment against the vendor, to a purchaser who has notice of the judgment, with intent to elude the judgment creditor, such conveyance is void, as against the creditor. *Jackson, ex dem. Merrit, v. Terry*, 471

#### G.

##### GAMING.

*Vide* AGREEMENT, 3. HORSE-RACING.

##### GIFT.

*Vide* ACTION ON THE CASE, 3.

##### GRANT.

*Vide* DEED, GRANTOR AND GRANTEE. ELECTION, 2, 3. STREAM OF WATER, 1.

##### GRANTOR AND GRANTEE.

1. A grantor cannot, after the execution of his deed, lawfully do any act to prejudice the rights of his grantee. Per *Thompson, Ch. J. Jackson, ex dem. Philips, v. Aldrich*, 106
2. And no declarations, admissions, or confessions, of the grantor, are to be admitted against the grantee. Per *Thompson, Ch. J. ib.*

#### H.

##### HABEAS CORPUS.

1. Where a *habeas corpus* is directed to a private person to bring up an infant, the Court are bound, *ex debito justitie*, to set the infant free from improper restraint; but whether they shall direct it to be delivered over to any particular person, rests in their discretion, under the circumstances of the case; and that although the person making the application be the father of the infant. *Matter of Waldron*, 418
2. Where an infant was in the custody of its grandfather, and it appeared that it would be more for the benefit of the infant to remain with its grandfather, than to be put under the care of the father, and no improper restraint was shown, the Court refused to direct the infant to be delivered to the father. *ib.*

Costs on removal of cause by *habeas corpus*, *vide* COSTS, II. 10.

##### HAYTI, (ISLAND OF.)

*Vide* INDEPENDENT STATE, 1.

##### HEIR.

Where an heir, sued on the bond of his ancestor, pleads *non est factum*, and the issue is found against him, this is not such a false plea as will render him liable, *de bonis propriis*. *Jackson, ex dem. Carman and others, v. Rosevell*, 97

##### HIGHWAYS.

1. In the case of an encroachment on the highway, (2 *N. R. L.* 277.) where the encroachment is not denied, all the commissioners must confer in regard to making an order to remove it, and the majority may act; but when the encroachment is denied, and the fact is to be inquired into by a jury, one of the commissioners alone may act, and make complaint to a justice

of the peace; or, at least, the want of a joint consultation will not vitiate an inquest subsequently found. *Bronson v. Mann*, 460

2. The certificate of a jury finding an encroachment, is conclusive evidence of that fact, in an action brought to recover the penalty for not removing the encroachment. *ib.*

#### HORSERACING.

1. An action to recover back a wager laid on the event of a horserace, is to be brought in the form prescribed by the act to prevent excessive and deceitful gaming; and if the plaintiff, in his declaration, state, that the action had accrued to him according to the form, and as is prescribed by the second and third sections of the act to prevent excessive and deceitful gaming, he will, nevertheless, be permitted to show a cause of action arising under the act to prevent horseracing. *Haywood v. Sheldon*, 88
2. The action is properly brought by the person who made the bet, although he acted as the agent or depository of other persons. *ib.*

### I.

#### ILLEGAL AGREEMENT.

*Vide* AGREEMENT, 3, 4. ASSUMPT, 7.

#### IMPOUNDING BEASTS

*Vide* DISTRESS.

#### IMPROVEMENTS.

*Vide* PARTITION, 1.

#### INDEPENDENT STATE.

1. The parts of the island of *St. Domingo*, respectively, under the government of *Petion* and *Christophe*, are not independent states, within the meaning of the act of congress of the 5th of *June*, 1794, and, therefore, it is not illegal to fit out a vessel for the purpose of assisting the one against the other. *Hoyt v. Gelston and Schenck*, 141  
*S. P. Gelston and Schenck v. Hoyt*, in Error, 561
2. It is not for Courts of law to determine whether a revolted colony has become an independent state, but for the government alone; and until the government has solemnly recognized its existence as a nation, Courts are bound to consider the ancient state of things as remaining. *Hoyt v. Gelston and Schenck*, 141  
*S. P. Gelston and Schenck v. Hoyt*, in Error, 561

#### INDICTMENT.

1. The arresting of judgment, after conviction, on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. *The People v. Casborus*, 351

Indictment for assault and battery, *vide* ASSAULT AND BATTERY.

Indictment for forcible entry and detainer, *vide* FORCIBLE ENTRY AND DETAINER, 3.

Indictment for larceny, *vide* LARCENY, 2.

*Vide* BILL OF EXCEPTIONS, I. EVIDENCE, II. 17. JUDGMENT, II.

#### INFANT.

*Vide* HABEAS CORPUS. ONONDAGA COMMIS-  
SIONERS. PARENT AND CHILD.

#### INJUNCTION.

1. Where an injunction to stay proceedings at law was issued on the order of a master in chancery, and the chancellor, on motion for that purpose, ordered the injunction to be dissolved, and the party immediately entered an appeal from that order; it was held, that the injunction was not revived by that appeal, so as to operate as a stay of the proceedings at law. *Hoyt v. Gelston and Schenck*, 139
2. Although an injunction operates only on the party, his attorneys, and agents, yet this Court will take notice of an existing operative injunction, for the purpose of promoting the ends of justice, and preserving harmony between the two Courts. *ib.*

#### INNS AND INNKEEPERS.

1. In an action to recover the penalty given by the 7th section of the act to lay a duty on strong liquors, &c. (sess. 24. c. 164.) the plaintiff may unite in his declaration any number of offences, but he can only recover the penalty for a single offence; and a conviction in such action is a bar to all prosecutions for offences of the like nature committed before such recovery. *Tiffany v. Driggs*, 258
2. It is unnecessary for the plaintiff to prove the day of committing the offence; and it will be sufficient for the justice, in making up the record of conviction, to insert the day laid in the declaration, although no particular day was proved. *ib.*
3. In an action on the 7th section of the act to lay a duty on strong liquors, (1 R. L. 178.) where the offence charged in the declaration is the selling of strong or spirituous liquors without a license, contrary to the first clause in that section of the statute, the plaintiff cannot proceed for the offence specified in the subsequent clause, viz. selling liquors to be drank in the house of the seller, without entering into a recognizance. *Bigelow v. Johnson*, 428

*Vide* AGREEMENT, 3.

#### INSOLVENT.

1. A plea stating that *A.*, the person beneficially interested, being an insolvent within the act of *April*, 1811, by the plaintiff, his agent, (under whose name *A.* sold the goods, to recover the price of which the



action was brought,) assigned the debt due from the defendant to B., in preference to the other creditors of A., is bad; such assignment being valid under the statute. *Caines v. Brisbane and Brannan*, 9

2. Where three assignees have been appointed under the insolvent act of the 3d of April, 1811, (since repealed,) one of whom refuses to act, and no other is appointed in his stead, the two who enter upon the execution of the trust may maintain actions for debts due to the insolvent in their own names, without joining the third. *Van Valkenburgh and another v. Elmendorf*, 314
3. When an order has been made for the assignment of an insolvent's estate, under the 9th section of the insolvent act, (1 N. R. L. 464.) the officer granting the order cannot afterwards vacate it, unless there has been surprise on the opposing creditors, or they have been misled by the opposite party. *Matter of Bradstreet*, 385
4. Where the counsel for the opposing creditors was, while going to the office of the recorder of New-York to oppose the insolvent's discharge, met by one of the attorneys for the petitioning creditors and insolvent, and detained by him in conversation, and the perusal of papers relating to the opposition, and in the mean time, the other attorney had appeared with the petitioning creditors before the recorder, and obtained an order for the assignment of the insolvent's estate, it was held, that, under these circumstances, the recorder ought to vacate the order *ib.*
5. The officer before whom the proceedings under the 9th section of the insolvent act are had, should be satisfied that two thirds of the creditors had requested that an assignment of the insolvent's estate should be made; although if it appears, after the assignment has been made, that two thirds of the creditors had not assented, the assignment is, notwithstanding, valid. *ib.*
6. If the creditors do not attend in due time to oppose, their assent is presumed, and that they have waived their opposition. *ib.*
7. The assignment having been made by the insolvent himself, under the 9th section of the insolvent act, he is to be discharged on conforming to the directions of the act, in respect to petitioning creditors; he must, therefore, make out, under oath, an account of his creditors, and a just and true inventory of his estate, and deliver over his estate to his assignees; but he is not bound to advertise anew. *ib.*

#### INSPECTION.

The act for the inspection of flour, &c. (sess. 36. ch. 27. 2 N. R. L. 320.) does not apply to flour purchased out of this state, (where it has been inspected and branded,) to be consumed in another state, and brought to New-York, and there shipped, with a view to be forwarded to its place of destination. *Hancock v. Sturges*, 331

#### INSURANCE.

##### Loss.

1. Insurance on a cargo from New-York to Antwerp. During the voyage, the ship was boarded by a British privateer, and carried into Portsmouth, in England, and after a short detention was released, and on arriving in Fushing roads, an armed force was put on board, and continued until her arrival at Antwerp, on the 21st July, 1807, where she was not suffered to land her cargo, nor to depart with it, the armed force being kept on board by the officer of the customs. On application by the consignee, leave was obtained from the French government, through its ministers, to land the cargo under the direction of the officer of the customs, on condition of its being placed in depot, in the custom-house stores, until the decision of the Emperor of France could be obtained. After remaining in this state of sequestration until 1810, the cargo was sold by order of the emperor, and the proceeds paid into his *caisse d'amortissement*. Held, that there was a total loss of the cargo by the arrest, restraint, and detainment of the French government. *Gracie v. New-York Insurance Co.* 161
2. A vessel was insured, among other risks, against fire: during the voyage a seaman carelessly put up a lighted candle in the binnacle, which took fire, and communicating to some powder, the vessel was blown up, and wholly lost: it was held, that the insurers were not liable for the loss. *Grim v. The Phoenix Insurance Co.* 451
3. Insurers are not liable for the fault, negligence, or misconduct of the master or mariners not amounting to barratry. *ib.*
4. A loss occasioned by the mere carelessness or negligence of the master or mariners, does not amount to barratry, which is an act done with a fraudulent intent, or *ex maleficio*. *ib.*

##### INTEREST.

Interest on judgment, *vide* ERROR, 6.

In an action against sheriff for money levied under an execution, *vide* EXECUTION, 7, 8.

#### J.

##### JOINDER OF PARTIES.

*Vide* PLEADING, 1, 3, 4. RELEASE.

##### JUDGMENT.

- I. Priority and lien of judgments and executions.
- II. Arrest of judgment.
- I. Priority and lien of judgments and executions.
1. Where A. was interested to the amount of 100 dollars in a judgment recovered by B. against C., and an execution was after-

wards issued at the suit of *D.* against *C.* on a junior judgment, under which execution *A.* purchased the land, as the trustee of *B.*, and took a deed from the sheriff, and immediately conveyed the land to *B.*, by whom the consideration was advanced, and then an execution was issued upon the elder judgment for the amount for which *A.* was interested therein, and levied upon the same premises, which were sold and conveyed by the sheriff to *A.*, it was held that *A.*, having executed the trust, by conveying the land to *B.*, when purchased by him at the first sale, was not thereby estopped from subsequently acquiring a title to the same premises, and might recover them in an action of ejectment, against a person holding under *B.*, and that although *B.* forbade the second sale, the conveyance under it was not inoperative; at least, that it could not be inquired into in a collateral action, and could only be determined on a direct application to this Court, or to a Court of equity. *Jackson, ex dem. Whitlocke, v. Mills,* 463

2. Where the body of a defendant is taken in execution, the lien of the judgment upon his land is suspended, and if, during his imprisonment, a *f. fa.* is issued on a junior judgment, under which his land is taken and sold, and he is then discharged from imprisonment, under the act for the relief of debtors with respect to the imprisonment of their persons, and then the plaintiff in the prior judgment issues a *f. fa.*, this does not give that judgment a priority of lien, or defeat the title acquired under the latter judgment. *Jackson, ex dem. Spencer, v. Benedict,* 533

Priority between sheriff's deed of lands in the military tract, and sale by defendant in the execution, *vide* MILITARY BOUNTY LANDS.

*Vide* COURTS OF JUSTICES OF THE PEACE, VIII. 25, 26.

## II. Arrest of judgment.

- 3 On a motion in arrest of judgment for a defect in the declaration, it is not necessary to produce the whole record in Court, but the declaration alone, adding, that a verdict had been found for the plaintiff, is sufficient. *Niven v. Mann,* 48
4. Averments are to be construed less strictly after verdict. *ib.*
5. The arresting of judgment, after a conviction on an indictment for a felony, is not a bar to a second indictment for the same offence, although the second indictment is precisely similar to the first. *The People v. Casbous,* 331
6. Where a Court of competent jurisdiction arrest a judgment at the instance of the defendant, it must be intended, legally, that the indictment was vicious. Per *Spencer, J.* *ib.*
7. The effect of arresting a judgment is the same as quashing an indictment before trial. Per *Spencer, J.* *ib.*

508

Interest on judgment, *vide* ERROR, 6.

Judgment, when an extinguishment, *vide* EXTINGUISHMENT.

## JUSTICES OF THE PEACE.

*Vide* APPRENTICE. INNS AND INNKEEPERS

## K.

### KAYADEROSSERAS PATENT.

1. The construction heretofore given to the *Kayaderosseras patent*, is not to be called in question. *Jackson, ex dem. Beckman, v. Stephens,* 495
2. The true northwesternmost head of the *Kayaderosseras* creek is that adopted by the commissioners for the division of the patent in 1770; and *Baker's Falls* are the third falls on the *Albany* river mentioned in that patent. *ib.*

## L.

### LANDLORD AND TENANT.

*Vide* EJECTMENT, II. TENANT AT WILL. USE AND OCCUPATION.

### LARCENY.

1. On the trial of an indictment for stealing a bank note, bill, &c., under the statute, (1 N. R. L. 174. sess. 24. ch. 58.) parol evidence of the contents of the bills or notes stolen, is admissible, without accounting for their non-production. *The People v. Holbrook,* 90
2. Where the indictment stated that the defendant stole four promissory notes, commonly called bank notes, given for the sum of 50 dollars each, by the *Mechanics' Bank*, in the city of *New-York*, which were due and unpaid, of the value of 200 dollars, the goods and chattels of *P. C.*, then and there found, &c., it was held a sufficient description, without saying they were the property of *P. C.* The word *chattels* denotes property and ownership. *ib.*

### LAW OF NATIONS.

*Vide* CAPTURE. INDEPENDENT STATE, 2.

### LEASE.

1. A covenant in a lease on the part of the lessor to let the lot, at the expiration of the term, to the lessee, without mentioning any price for which it was to be let, is not a covenant for a perpetual lease, or for a perpetual renewal of the lease, and can, at best, be extended to a single renewal for the term for which the original lease was given. *Abel v. Radcliff,* 297
2. But it is not capable even of the latter construction, and is altogether void for uncertainty. *ib.*
3. An action on the case in the nature of waste lies against the assignee of a lessee. *Short v. Wilson and others,* 33

**LIEN.**

Of judgments and executions, *vide* JUDGMENT, I.

**LIMITATION OF ACTIONS.**

1. To take a demand out of the statute of limitations, there must be a promise express or implied. *Laurence v. Hopkins*, 288
2. And no promise can be inferred from a declaration of the defendant, that he was not holden to pay any thing, and that the contract could not be enforced at law, and that he never would pay any thing, as it was an unjust debt. *ib.*
3. An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the statute of limitations. *ib.*
4. In an action to recover the amount of an order which had been drawn by the defendant, but which the drawee had refused to pay, the defendant pleaded the statute of limitations, and a witness testified, that, after the lapse of six years, he presented the order to the defendant, who did not pretend but that the money was due, and said that he did not recollect paying it, but that he would examine his papers, and if he had paid it, he would write to the witness, who, however, never received any communication from the defendant upon the subject; it was held, that this was sufficient evidence from which to imply a promise by the defendant to pay the money, if he should find that it had not been paid, and thus to take the case out of the statute of limitations. *Mosher v. Hubbard*, 510

Adverse possession, *vide* EJECTMENT, 1.

**LOCATION.**

*Vide* PATENT.

**M.**

**MAINTENANCE.**

1. Where a person undertakes to sell land which is held adversely to him, it is immaterial whether his title, or claim, were good or bad, and the parties to such sale will be equally within the statute against champerty and maintenance. *Tomb v. Sherwood*, 289
2. So, where a person obtained a certificate from the surveyor-general of the state, that he purchased a lot of land, and the land was then sold under an execution against him, and he afterwards assigned the certificate, it was held that the assignee was liable to the penalty of the statute. *ib.*
3. And the value to be recovered is not only that of the land actually occupied and cultivated, but of the whole lot of which it is parcel, and which is claimed in connection with it. *ib.*
4. A person who sells and conveys land

without the knowledge that there is a subsisting adverse possession, is not liable to the penalty for selling a pretended title, under the 8th section of the act to prevent champerty and maintenance. (1 N. R. L. 173.) *Hassenfrats v. Kelly*, 466

5. The seller of land is, however, in the first instance, to be presumed connusant of the situation of it. *ib.*
6. Where a person enters upon new lands without claim, or color of title, and conveys them, by deed, to a third person, and the lawful owner of the land, not having notice of these facts, afterwards sells and conveys the same, he is not liable to the penalty for selling a pretended title. *ib.*

*Vide* DEED, II.

**MESNE PROFITS.**

*Vide* EJECTMENT, IV.

**MILITARY BOUNTY LANDS.**

A sheriff's deed for lands in the military tract must be recorded; and if, after land has been sold on execution, and a conveyance made by the sheriff, and before such conveyance is recorded, the former proprietor conveys it to a *bona fide* purchaser, for a valuable consideration, who has his deed first recorded, such subsequent purchaser will gain a priority. *Jackson, ex dem. Merrill, v. Terry*, 471

*Vide* ONONDAGA COMMISSIONERS.

**MILITIA.**

1. A contractor for carrying the mail is not exempt from military duty. The exemption only extends to persons engaged in the actual conveyance of it. *Johnson v. Hunt*, 186
2. In an action against the president of a court-martial to recover back a fine, the objection cannot be made that the person who warned the defendant to appear on parade, and before the court-martial, was not duly appointed a sergeant, even if the objection could be taken before the court-martial. *ib.*

**MORTGAGE.**

1. L., having, by his agent, B., agreed to purchase a farm of F., for 2,000 dollars, advanced the money to B. for the purpose of completing the purchase, and B. paid to F. 1,000 dollars, and gave his bond to F. to pay off a prior mortgage, for the like sum, to P., retaining the 1,000 dollars unknown to L. Held, that though P. knew of B.'s retaining the 1000 dollars, instead of paying off the mortgage, and had agreed with B. that the mortgage should be paid by land, for the purpose of which he had entered into an agreement with B., which agreement, however, was not performed by B.; yet his title under the mortgage was not affected by the arrangement, there being no fraud on his part, but that L. must bear the loss arising from the mis-

- conduct of his own agent. *Jackson, ex dem. Potter, v. Leonard and others*, 180
2. A mortgage interest passes under general words in the will of the mortgagee relating to the realty. *Jackson, ex dem. Livingston, v. Delancy*, 537

## N.

## NEW TRIAL.

Where a question of adverse possession was not, on the trial, submitted to the jury, it will be presumed to have been abandoned, and cannot be made a ground of moving for a new trial. *Jackson, ex dem. Beckman, v. Stephens*, 496

## NOTICE.

*Vide FRAUDULENT SALES AND CONVEYANCES.*

## NOTICE TO PRODUCE PAPERS.

*Vide EVIDENCE, II. 16, 17, 18.*

## NINE PARTNERS' PATENT.

The northern boundary of the patent to *Sanders and Heermance*, forms the southern boundary of the *Nine Partners' Patent*, and there is no intermediate space, or *gorre*, between the two patents. *Jackson, ex dem. Ludlow, v. Soule*, 336

## O.

## ONONDAGA COMMISSIONERS.

By the 8th section of the act to settle disputes concerning the titles to lands in the county of *Onondaga*, infants have three years after their coming of age in which to file their dissent, and are not, like adults laboring under no disability, restricted to two years; but after filing their dissent, they are to give notice to the commissioners, to commence a suit within three years, &c., according to the directions of the 3d section of the statute. (1 *N. R. L.* 213. 215.) *Jackson, ex dem. Boyd, v. Lewis*, 504

## ORIGINAL WRIT.

1. The original writ in assumpsit against a corporation, must be in the nature of a summons, and not by *pone*, or attachment. *Lynch v. Mechanics' Bank*, 127
2. And where the original is by *pone*, or attachment, it cannot be amended, being conformable to the *præcipe*, but may be quashed on motion. *ib.*
3. The original writ against a private person for a certain demand, is a *præcipe*, on which the process is by summons. *ib.*
4. But where the demand is uncertain, it is a *si te fecerit securum*, and the process is by *pone*, or attachment. *ib.*
5. Original writs issuing out of this Court, pursuant to the statute of the 17th of February, 1815, (sess. 38. ch. 38.) must be tested like all other process issuing out of the Court, that is, on some day in term. *ib.*

6. And it seems, that they may be tested before, if issued after the cause of action arose. *ib.*

## OVERSEER OF THE POOR

*Vide APPRENTICE, 2*

## P.

## PARENT AND CHILD.

1. A parent is bound to provide his infant children with necessaries, and if he neglect to do so, a third person may supply them, and charge the parent with the amount. *Van Valkenburgh v. Watson*, 490
2. But such third person must take notice of what is necessary for the infant according to his situation in life, and where the infant lives with his parent, and is provided for by him, a person furnishing necessaries cannot charge the parent. *ib.*

*Vide BARON AND FEME, 3. HABEAS CORPUS.*

## PARTITION.

1. Where a person entered into and improved land, by the permission of a tenant in common of the land, and a partition was afterwards made in 1793, (see acts of the 16th March, 1785, and 3d April, 1792.) it was held, that the person to whose share the land in question had fallen, could not maintain an action of ejectment for it, without tendering to the tenant the value of the improvements, both before, and for all the time since the partition, after deducting for the use and occupation of the land. *Jackson, ex dem. Fisher, v. Cross and Kellogg*, 116
2. Where a partition was made in 1764. under the colonial act of 1762, and on the trial, in 1813, the map and field book, which had been filed pursuant to the directions of that act, were produced in evidence, but the balloting book could not be found, it was held, that after such a lapse of time, and the act of the parties recognizing the partition, it would not be invalidated on account of the want of the balloting book. *Jackson, ex dem. Klock and others, v. Richtmyer*, 367
3. And an agreement relating to the partition, executed by a third person in the name of one of the parties, who it did not appear had any authority to execute it, was held to be ratified by the subsequent acts of the party in whose name it was made. *ib.*
4. Where land was conveyed, and the grantee entered into possession, and afterwards proceedings were had in partition in relation to the same premises, to which the grantee was not a party, and the premises were sold by commissioners appointed by the Court, and conveyed by them to the purchaser, it was held, that the first grantee was not precluded, by the proceedings in partition, from controverting the right of the subsequent purchaser, and that he

possession being adverse, the deed from the commissioners was void. *Jackson, ex dem. Smith, v. Vrooman*, 488

PATENT.

In ancient patents, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. *Jackson, ex dem. Schenck and others, v. Wood*, 346

Ambiguity in, *vide EVIDENCE*, II. 23, 24.

PERFORMANCE.

*Vide AGREEMENT*, 6, 7. *ASSUMPSIT*, 1, 2, 3.

PHILLIPS'S PATENT.

*Vide RUMOUT PATENT*, 2.

PLEADING.

- I. *Parties to the action.*
- II. *Declaration.*
- III. *Plea.*
- IV. *Replication.*
- V. *Demurrer.*
- VI. *Plea puis darrien continuance.*
- VII. *Pleading in particular actions and cases.*
- VIII. *Variance.*

I. *Parties to the action.*

1. In debt, on bond, to the committee or trustees of a corporation, *solvendum* to the corporation by its true name, the corporation may declare in their own name, and may allege that the bond was made to them by the description of the committee, &c. *New-York African Society v. Varick and others*, 33
2. An action to recover back a wager laid on the event of a horserace, is properly brought by the person who made the bet, although he acted as the agent or depositary of other persons. *Haywood v. Sheldon*, 88
3. Tenants in common must join in an action of trespass, *quare clausum fregit*. *Austin and others v. Hall*, 286
4. Where three assignees have been appointed under the insolvent act of the 3d of April, 1811, (since repealed,) one of whom refuses to act, and no other is appointed in his stead, the two who enter upon the execution of the trust, may maintain actions for debts due to the insolvent, in their own names, without joining the third. *Van Valkenburgh and another v. Elmendorf*, 314
5. Where a promise is made to the overseers of the poor, their successors cannot maintain an action upon it, they not being a corporation. *Shear v. Overseers of Hillsdale*, 496

II. *Declaration.*

- 6 A declaration may count, as on a promise by parol, and it may be supported by a

promise in writing, if it comport with the promise stated. *Nelson v. Dubois*, 177

7. Where a penal statute gives no form of declaring, the plaintiff must set forth specially the facts which constitute the offence. *Bigelow v. Johnson*, 428
8. In an action against the surety on an administration bond, it is sufficient for the plaintiff to state that goods, chattels, and sums of money, of the deceased, to a large amount, to wit, the amount of, &c., had come into the hands of the administratrix, which she had converted and disposed of to her own use, &c., the creditor not being presumed to know precisely what goods, &c., the administratrix had, and this fact lying more properly in the knowledge of the defendant. *The People v. Dunlap*, 437
9. Where, in a declaration upon an instrument in writing, no venue is stated in the body of the declaration, but only in the margin, and no place is alleged at which the instrument was executed, it is no variance if the instrument produced in evidence bears date at a different place from that in which the venue is laid. *Alder v. Griner*, 449
10. It seems that it would have been otherwise had a place been stated in the body of the declaration. *ib.*
11. A count in debt, on simple contract, may be joined in the same declaration with a count in debt on a judgment, although the pleas are different. *Union Cotton Manufactory v. Lobdell and another*, 462
12. Causes of action which admit of the same pleas, and of the same judgment, may be joined in the same declaration. *ib.*
13. In a declaration in trespass on the case, it was alleged, that the defendant, by false representations, procured certain cattle belonging to the plaintiff, to be seized by a custom-house officer, under pretence that they were about to be smuggled into Canada, and then proceeded to state, that, in consequence of these representations, the cattle were converted and disposed of to the use of the United States; it was held, that, after a verdict for the plaintiff, it could not be intended, from this allegation, that the cattle were condemned as forfeited to the United States. *Hastings v. Wood and Curtis*, 482
14. When there is a demurrer to the whole declaration, and one of the counts is bad, that count cannot be referred to for the purpose of helping out and aiding another count. *Nelson v. Swan*, 483
15. The common money counts may be united in one count, in which may be comprised a count for goods sold, in the like general form. *ib.*
16. But a count generally, for certain lands sold and conveyed, by the plaintiff to the defendant, without any particular description, is bad, and cannot be joined with the common counts. *ib.*

Amending declaration by changing venue,  
*vide* AMENDMENT, 2.

Declaration in debt, on bond, by corporation,  
*vide* CORPORATION, 1, 2.

### III. Plea.

17. Where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action. *Austin and others v. Hall*, 286

18. So, in an action, by tenants in common, for a trespass on land, of which they are the co-heirs, a release by one of the plaintiffs is a bar to the action. *ib.*

19. Where the defendant to an action of covenant pleaded, that the plaintiff himself, and others, were associated as co-partners, under a certain firm, and that he, with B. and C., were appointed agents and directors for the company, and that he executed the agreement in his capacity of agent, or director, and not otherwise, without averring, or setting forth his authority, the plea on demurrer was held bad. *White and others v. Skinner*, 307

20. Where a person seals a deed, or executes a covenant in behalf of others, he is bound to aver, or set forth and prove, the authority under which he acted. It is not enough to crave oyer of, and set forth the instrument executed by him in his plea. *ib.*

21. Under the plea of *nul tiel record*, the defendant cannot give notice of special matter to be offered in evidence at the trial. *Raymond v. Smith*, 329

22. The statute has reference to such issues only as are to be tried by the country. *ib.*

23. In an action on a recognizance of bail, under a plea of payment, evidence of payment of a less sum than the amount of the judgment is inadmissible. *Mechanics' Bank v. Hazard*, 353

24. Nor could payment of a less sum be pleaded, although accepted in full satisfaction. *ib.*

25. Where the plaintiff in an action of covenant assigns a particular breach, a general plea of performance, pursuing the words of the covenant, is bad on general demurrer. *Bradley v. Osterhoudt*, 404

26. So, where the covenant was to convey a farm, and the plaintiff assigns for breach, that, before executing the conveyance, the defendant removed from the premises a cider-mill which was annexed to the freehold, the defendant must answer particularly the breach assigned. *ib.*

27. The want of consideration cannot be pleaded in avoidance of a deed. *Dorr v. Munsell*, 430

28. In an action of debt on bond, the defendant cannot plead a failure of consideration, or that he was induced to give the bond by a fraudulent representation of the value of a thing, which afterwards turned out to be of no value, as where the consideration of a bond was the transfer of a patent right

to which the plaintiff was not entitled as the original inventor. *ib.*

29. Fraud may be given in evidence under *non est factum*, only where it relates to the execution of the instrument. *ib.*

30. A notice of special matter to be given in evidence under the general issue, although not required to be in the strict technical form of a plea, yet must contain all the facts necessary to be stated in a special plea. *Shepard v. Merrill*, 475

Plea or notice of set-off, *vide* SET-OFF, 1.

### Vide INSOLVENT, I.

### IV. Replication.

31. In an action of *assumpsit* for goods sold, the defendant pleaded, that one A. carried on business under the name of the plaintiff; that the plaintiff, as agent of A., sold the goods; as such agent, assigned the debt of the defendant to a creditor of A., and then pleaded a set-off against A.; the plaintiff replied that A. did not, by the plaintiff, sell the goods; it was held, that the replication tendered a material issue, and was good. *Caines v. Bristan and Brannan*, 9

### V. Demurrer.

32. Where there is a general demurrer to a declaration containing both good and bad counts, judgment will be given for the plaintiff. *Martin and others, v. Williams*, 264

S. P. Monell and Weller v. Colden, 402

33. So, where several breaches are assigned in a declaration, some of which are well assigned, and others not, and the defendant demurs generally, judgment will be given for the plaintiff. *Martin and others v. Williams*, 402

34. So, where the plaintiff assigns breaches in his replication, some of which are well assigned, and others not, and the defendant demurs generally, judgment will be given for the plaintiff. *ib.*

35. Where there is a demurrer to the whole declaration, and one of the counts is bad, that count cannot be referred to for the purpose of helping out and aiding another count. *Nelson v. Swan*, 483

### VI. Plea puis darrien continuance.

36. Where a plea, *puis darrien continuance*, is filed in term time, a copy of it must be served; but where the matter of the plea arises in vacation, so that it can only be offered at the circuit to prevent a trial, no copy is necessary. *Jackson, ex dem. Barhydt, v. Clow*, 157

### VII. Pleading in particular actions and cases

37. Any matter which shows that the plaintiff never had any cause of action, may be given in evidence under *non-assumpsit*; and most matters in discharge of the action, which shows that at the time of the commencement of the suit, there was no subsisting cause of action, may be taken

- advantage of under this issue. *Wilt and Green v. Ogden*, 56
- 38 Where an action is brought for the non-performance of a contract, the defendant may show, under the general issue, that he offered to perform his part of the contract, but was prevented by the act of the plaintiff. *ib.*
39. In an action against *A.* and *B.* on their joint note, payable to *C.* on demand, *A.* pleaded that he signed the note as surety for *B.*, and requested *C.* to proceed immediately to collect the money of *A.*, who was then solvent; but that *C.* neglected to proceed against *B.* until he had become insolvent, and had absconded, whereby the money, as against *B.*, was lost. On demurrer, this was held to be a good plea in bar of the plaintiff's action against *A.* *Pain v. Packard*, 174
40. A declaration on a bond conditioned for the performance of covenants, commencing in debt, after setting forth the condition, and assigning breaches, and concluding as in covenant, and with demanding damages, is, it seems, good on special demurrer. *Gale and Stanley v. O'Brien*, 189
41. But it is certainly good on a general demurrer. *ib.*
42. In an action on the case for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was afterwards evicted by the rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving from the plaintiff to the defendant, or the price paid, as that is only a matter relating to the liquidation of damages. *Barney v. Dewey*, 224
43. If the declaration state, that the vendor gave evidence on the trial of the suit, in which such recovery was had, in favor of the true owner of the chattel, this is tantamount to an averment of notice of the pendency of the suit. *ib.*
44. Where, in an action of debt against heirs and devisees, the defendants plead *riens per descent*, the plaintiff replying that they had assets by descent before exhibiting the bill, may conclude with a verification. *Labagh and wife v. Cantino and others*, 272
45. In an action of trespass against an officer of the militia, who has issued a warrant for collecting a fine for delinquency, pursuant to the order of a regimental court-martial, the defendant cannot give this special matter in evidence as a justification, under the general issue. *Buttsworth v. Soper*, 443
46. An officer of the revenue seizing goods as forfeited, and causing them to be libelled and tried, in an action of trespass by the owner, can only plead a condemnation, or an acquittal, with certificate of probable cause. *Gelston and Schenck, v. Hoyt*, 561

Declaration in debt on bond by corporation, *vide CORPORATION*, 1, 2.

Declaration in slander, *vide SLANDER*, 1, 2, 3, 4.

### VIII. Variance.

47. A promissory note was alleged in the declaration to have been drawn by the defendant by the name of "*Christopher Bulkley*," and the note produced in evidence was signed "*Christ. Bulkley*;" it being proved that this was the defendant's usual mode of signing his name, it was held, that there was no variance. *Wood v. Bulkley*, 486
48. A defendant cannot allege, at the trial, that there is a variance between the copy of the declaration as served, and the *nisi prius* record; the judge must be governed by the record alone, and if there is a material variance, the party must apply to set aside the verdict. *ib.*

*Vide ante*, II. 9, 10.

### POOR.

1. A binding by a voidable indenture, and a service under it for two years, gives the apprentice a settlement in the town in which he served; and it is not competent for the town to object to the validity of the binding. *Overseers of Hudson v. Overseers of Tugghkanock*, 245
2. *A. B.*, a pauper, was removed, by an order of two justices, from the town of *T.*, to the town of *S.*, on appeal: the order was quashed, and the overseers of *T.* directed to pay a sum of money to the overseers of *S.*, on account of the expenses of the pauper, between the time of the removal and quashing the order. At the time the order was quashed, the pauper could not, by reason of ill health, be re-conveyed to *T.*, but was supported, for some time thereafter, at the expense of the overseers of *S.* Held, that the overseers of *S.* could not maintain an action of assumpsit against the overseers of *T.* to recover the amount of those subsequent expenses, there being no previous request or express promise to pay them; and admitting that a moral obligation would be a good consideration for an implied promise, here was no moral obligation on the part of the overseers of *T.*, as it did not appear that the pauper was legally settled in *T.*; for the order of sessions quashing the original order of removal, does not prove that the pauper was settled in *T.*, but only that he was not settled in *S.* *Overseers of Tioga v. Overseers of Seneca*, 320
3. Whether the provision of the act for the relief and settlement of the poor, (sess. 33. ch. 78. sect. 15.) giving a summary remedy to the overseers of the poor of one town, who have supported a pauper of another town, who, by reason of sickness, could not be removed, against the overseers of that other town, is cumulative, or

takes away the common law remedy?  
*Quere. Overseers of Tioge v. Overseers of Seneca,* 380

4. Whether, if *A. B.* had had no legal settlement in this state, the overseers of *S.* could have maintained an action against the overseers of *T.*, for the expenses incurred subsequently to quashing the order of removal? *Quere.* *ib.*

Where a promise is made to the overseers of the poor, their successors cannot maintain an action upon it, they not being a corporation. *Shear v. Overseers of Hillsdale,* 496

*Vide* APPRENTICE, 2.

### POWER.

*Vide* TRUST AND TRUSTEE, 1.

### PRÆCIPE.

*Vide* ORIGINAL WRIT, 2, 3.

### PRACTICE.

- I. *Process.*
- II. *Affidavits.*
- III. *Changing venue.*
- IV. *Judgment as in case of nonsuit.*
- V. *Trial and inquest.*
- VI. *Motions, arguments, cases, and notices of motion.*

#### I. *Process.*

1. The attorney may alter the test and return day of a capias before it is served; and where the sheriff is authorized and instructed by the attorney, to alter the return day in case the writ cannot be served before, he may make the alteration before bail is taken or appearance is endorsed. *Steen v. Wattles,* 158
2. It is the duty of the sheriff to return a writ without a rule of Court for that purpose; and he cannot avail himself of his neglect of duty to defeat an action for an escape. *Hinman v. Brees,* 529
3. The latest period which the law allows for the service of a writ is the day on which it is returnable. *Stingerland v. Smart,* 255

#### II. *Affidavits.*

4. In collateral matters arising in the progress of a suit, as on a motion for a commission to examine witnesses abroad, affidavits taken before magistrates or public officers out of the state may be read. *Marshall v. Mett,* 423

#### III. *Changing venue.*

5. Where the venue in a cause is changed, it is not necessary to serve the defendant with a new declaration, but only with a copy of the rule for changing the venue; and the declaration on file may be altered at any time so as to conform to the rule. *Smith v. Sharp,* 466
6. The want of the alteration is no excuse for an irregularity on the part of the defendant, who must proceed as if it had actually been made. *ib.*

514

Amending declaration by changing venue,  
*vide* AMENDMENT, 2.

#### IV. *Judgment as in case of nonsuit.*

7. On a motion for judgment, as in case of nonsuit, for not bringing to trial an issue joined in the city of *New-York*, the affidavit must state that the cause could have been tried in its order on the calendar, or that younger issues were tried. *Russel v. Barnes,* 156

#### V. *Trial and inquest.*

8. A plaintiff may be compelled to be nonsuited without his consent, when the evidence offered by him is not sufficient to support his action, there being no question of fact to be decided. *Pratt v. Hull,* 334

#### VI. *Motions, arguments, cases, and notices of motion.*

9. The 6th rule of *January* term, 1799, as to preparing, amending, and settling cases, is extended to cases made subject to the opinion of the Court. *Reg. Gen. January 12th, 1816,* 160
10. Notes of issue must be filed in the clerk's office of the city where the Court is to be held, on the *Friday* preceding term. *Reg. Gen. May 10th, 1816.* 363

### PRETENDED TITLE.

*Vide* DEED, II. 8, 9. MAINTENANCE.

### PRINCIPAL AND AGENT.

*Vide* AGENT. FACTOR.

### PRIORITY.

*Vide* JUDGMENT, I.

### PRISONERS.

1. Where an action has been brought against a sheriff for the escape of a prisoner in execution, the plaintiff has thereby determined his election, and cannot afterwards oppose the discharge of the prisoner, under the act for the relief of debtors with respect to the imprisonment of their persons. *M'Elroy v. Mancius,* 121
2. It seems that the Mayor's Court of *Albany* has no jurisdiction under the act for the relief, &c., in case of a debtor imprisoned in the county of *Albany*, under an execution out of the Supreme Court; but that the common pleas of *Albany* county have jurisdiction in such case. *ib.*

*Vide* JUDGMENT, I. 2.

### PRIVILEGE.

*Vide* ATTORNEY.

### PRIZE.

*Vide* CAPTURE.

### PROCESS.

*Vide* PRACTICE, I.

### PROPERTY.

*Vide* CAPTURE.



**Q.**

**QUIET ENJOYMENT.**

*Vide* COVENANT, 1, 2, 3. FRAUDS, (STATUTE OF,) 3.

**R.**

**REGISTRY OF DEEDS.**

*Vide* EXECUTION, 13, 14.

**RELEASE.**

1. A release, not by deed, and without consideration, executed after a breach of a promise, is void. *Crawford v. Millspeugh*, 87
2. If the holder of a note, after the time of payment, and after a suit has been commenced against the endorser, release the maker, by writing not under seal, and without consideration, such release is void, and is no defence in the action against the endorser. *ib.*
3. Where several plaintiffs must join in bringing a personal action, a release by one joint plaintiff is a bar to the action. *Austin and others v. Hall*, 296
4. So, in an action by tenants in common, for a trespass on land, of which they are the co-heirs, a release, by one of the plaintiffs, is a bar to the action. *ib.*

**RENEWAL OF LEASE.**

*Vide* LEASE, 1, 2.

**RENT.**

1. A recovery on a covenant for the payment of rent is not, without actual satisfaction, an extinguishment of the rent; and the lessor may, notwithstanding such recovery, distrain for the rent in arrear. *Chipman v. Martin*, 240
2. And the lessee cannot maintain an action to recover double damages for taking a distress when no rent is due. *ib.*

**RES JUDICATA.**

*Vide* EVIDENCE, I. 1, 2, 3, 4, 5, 6.

**REVERSION.**

*Vide* DESCENT.

**RULES, GENERAL,** 160. 303. 422.

**RUMBOUT PATENT.**

1. The south boundary of the *Rumbout* patent is an east and west line. *Jackson, ex dem. Schenck and others v. Wood*, 346
2. The south boundary of the *Rumbout* patent is the north boundary of the *Phillips's* patent, and there is no gore, or unpatented land, between those patents. *ib.*

**S.**

**SALE.**

1. Where a person agreed to sell land to another, and covenanted to give a deed of the premises to him at a certain time and place, the tender of a deed without cove-

nant or warranty is a performance of the covenant; nor is it necessary that the wife of the vendor should join in the deed. *Ketchum and Sweet v. Evertson*, 359

2. A party who has advanced money, or done any act in part performance of an agreement, but refuses to proceed to the completion and execution of the contract, the other party having performed, or being ready to perform, every thing agreed to be done on his part, cannot recover back the money he has advanced, nor is he entitled to compensation for what he may have done in part performance; and, on such refusal to proceed, or voluntary abandonment of the contract, by the vendee, the vendor is at liberty to sell the land to another. *ib.*
3. Where a person is induced to purchase land by a false representation, that a certain privilege is annexed to the land, but which is not included in the deed, he may maintain an action on the case against the vendor. *Monell and Waller v. Colden*, 395
4. Where a person was induced to purchase and give a higher price for a lot of land, upon a navigable river, by a fraudulent representation that he would, as proprietor of the land, be entitled to a grant from the commissioners of the land-office, of the land covered with water adjacent thereto, and the purchase being completed, the purchaser, on applying for a grant from the commissioners, discovered that the adjacent land, under water, had previously been granted, and that the title to it was out of the state, it was held, that the purchaser might maintain an action on the case for the deceit. *ib.*
5. It seems that the measure of damages, in such case, is the difference between the value of the land conveyed, and the sum which the purchaser was induced to pay by the fraudulent representation. *ib.*

*Vide* ACTION ON THE CASE, 5. ASSUMPT FOR MONEY HAD AND RECEIVED, 1. FRAUDULENT SALES AND CONVEYANCES. MILITARY BOUGHT LANDS.

**SALE OF CHATTELS.**

1. Where, after the sale of a chattel, it is agreed that the vendor may, within a reasonable time, return it, and receive back the price, if returned in as good condition as at the time of delivery, and the vendee afterwards rescinds the contract, and returns the chattel to the vendor, who receives it without objection, and gives back the price, the latter is concluded, by his own act, from maintaining an action against the vendee for any deterioration of the chattel not arising from a secret injury. *Lord v. Kenny*, 219
2. In an action on the case, for falsely affirming that a chattel belonged to the defendant, whereby the plaintiff was induced to buy it, and was afterwards evicted by the

rightful owner, it is unnecessary to set forth the contract between the parties, or any consideration moving from the plaintiff to the defendant, or the price paid, as that is only a matter relating to the liquidation of damages. *Barney v. Dewey*, 224

3. A recovery from the vendee by the rightful owner is conclusive evidence against the vendor. *ib.*
4. If the declaration state, that the vendor gave evidence on the trial of the suit, in which such recovery was had, in favor of the true owner of the chattel, this is tantamount to an averment of notice of the pendency of the suit. *ib.*
5. Whether a contract for a sale of chattels has been completed, is a question of fact for the jury, and the plaintiff ought not to be nonsuited, on the ground that the contract was not fully made out. *De Ridder v. M'Knight*, 294
6. Where, on the sale of land, the vendee also agrees to purchase certain ponderous articles on the premises, and then enters into possession of the land, the articles sold still remaining upon it, this is a sufficient delivery. *ib.*
7. In an action for the price of a chattel, the defendant may prove a deceit in the sale, and that the chattel was of no value, and thus defeat the plaintiff's action; or if the unsoundness produced merely a partial diminution of the value, he may show that part in mitigation of damages. *Becker v. Vrooman*, 302
8. Where goods are sold, to be paid for on delivery, if, on the delivery being completed, the vendee refuses to pay for them, the vendor has a lien for the price, and may resume the possession of the goods. *Palmer v. Hand*, 434
9. And if, during the delivery, and before it is completed, the purchaser sells or pledges them to a third person, for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser. *ib.*
10. Where A. transferred to B. stock in a turnpike company, which, at the time of the transfer, appeared by the books of the company to have been fully paid up by a credit of interest on the amount before paid in, pursuant to a resolution of the directors, and this resolution was, after the transfer, repealed, and the stockholders called upon to pay in the amount before allowed for interest, in consequence of which B. paid to the company that sum on the shares transferred to him by A., it was held, that B. could not maintain an action to recover the amount from A., there being neither fraud nor a warranty. *Cunningham v. Spier*, 392

*Vide ASSUMPSIT FOR MONEY PAID.*

#### SANDERS AND HEERMANCE'S PATENT.

The northern boundary of the patent to Sanders and Heermance forms the southern

boundary of the *Nine Partners' patent*, and there is no intermediate space, or *gorre*, between the two patents. *Jackson*, ex dem. *Ludlow*, v. *Sorole*, 326.

#### SCIRE FACIAS.

A *scire facias* to revive a judgment, irregularly issued, or an execution issued after a year and a day, without *scire facias*, is voidable only, and cannot be called in question in a collateral action, so as to defeat the title of a purchaser under the execution; and it seems, that after the lapse of twenty years, it cannot be avoided on a direct application for that purpose. *Jackson*, ex dem. *Livingston*, v. *Delancy*, 537

#### SEAMEN'S WAGES.

1. Where a seaman, who had signed shipping articles, by which he engaged not to absent himself from the vessel without leave, until the voyage was ended, and the vessel discharged of her cargo, on the vessel's arriving at her last port of discharge, and being there safely moored, refused to remain and assist in discharging the cargo, but absented himself without leave, it was held, that by such desertion he had forfeited his wages. *Webb v. Duckingfield*, 390
2. Though the master has no right to insert in the shipping articles any stipulation, or agreement, repugnant to the laws of the *United States*, yet he may add any provisions consistent with the laws relative to seamen. *ib.*
3. The contract with a seaman continues in force until the cargo is finally discharged, before which, if he leaves the ship, he is not entitled to wages. *ib.*
4. Where a person becomes surety to the owner of a vessel, that certain seamen, shipped on board the vessel, shall proceed upon the voyage, and the seamen receive wages in advance, which they pay to their surety as his indemnity, in case the seamen desert the vessel before the commencement of the voyage, the owner cannot maintain an action for money had and received, against the surety, to recover back the wages advanced. *Dodge v. Leam*, 508
5. Where, in shipping articles of seamen, a person has signed his name under a column headed "Sureties," but there is no explanation added as to the extent of his undertaking, it is not a sufficient writing within the statute of frauds, and the undertaking is void. *ib.*

#### SECURITY FOR COSTS.

*Vide COSTS*, I. 2, 3, 4.

#### SERVANTS AND SLAVES.

*Vide ACTION ON THE CASE*, 4.

#### SET-OFF.

1. It seems that a set-off cannot be pleaded, but that notice of it must be given under

the general issue. *Caines v. Brisban and Brannan*, 9

2. It seems, that a set-off is not restricted to the parties on the record; but if the plaintiff be only an agent or trustee, the defendant may set off a debt due from the principal or *cestuy que trust*. *ib.*
3. But it seems, that if the agent had a lien upon the demand of his principal, prior to the time that the defendant's right of set-off accrued, the latter is precluded from his set-off. *ib.*

Set-off of damages and costs, *vide* Costs, II. 8.  
In a justice's Court, *vide* Courts or Justices of the Peace, III. 8, 9.

### SETTLEMENT OF POOR

*Vide* Poor.

#### SHERIFF.

1. A sheriff is entitled to three dollars *per diem* for going to, and returning from, the Supreme Court. *Bryan v. Seely*, 123
2. Where a defendant has been taken under a *ca. sa.*, and discharged from custody, on the ground that no previous *fi. fa.* had been issued on the judgment, (there being special bail in the action,) the sheriff is, notwithstanding, entitled to poundage; as he has incurred the risk of being made liable for an escape, in an action for which he could not have availed himself of the irregularity as a defence. *Scott v. Shaw*, 378
3. And it makes no difference that the defendant, after his discharge, confessed a new judgment to the plaintiff, for the amount of the former judgment, on which satisfaction was entered, and that a *ca. sa.* having been regularly issued on the second judgment, the sheriff had been paid his poundage thereon. *ib.*

Sheriff's deed, *vide* DEND, I. 6. II. 7. EXECUTION, 3, 4, 5, 10, 11.

*Vide* ESCAPE. EXECUTION. PRISONERS, 1.

### SHIPPING ARTICLES.

*Vide* FRAUDS, (STATUTE OF), 5. SEAMEN'S WAGES.

#### SLANDER.

1. A declaration in slander, for charging the plaintiff with *swearing to a lie*, as a witness on a trial in a justice's Court, in which it is not stated that the justice had jurisdiction, or that the testimony was given upon a material point, is good, at least, after verdict. *Nixon v. Munn*, 48  
*Et vide* *Chapman v. Smith*. *Per* *Spencer*, J. 81
2. The same certainty is not requisite as in an indictment for perjury. *Nixon v. Munn*, 48
3. A declaration in slander, charging, that in a certain cause, before a Court of three justices of the peace, constituted under the act concerning apprentices and servants, to

hear and determine a certain cause between the people of the state of *New-York* and the defendant, the plaintiff was examined on oath administered by the said Court, they having full power to administer the same, and had given evidence for, and in behalf of, the people, and that the defendant spoke, of, and concerning, the plaintiff and the prosecution, and the evidence given by the plaintiff on the trial, and on a point material to the prosecution, these words, *You have sworn to a damned lie, and I can prove it*, is good, there being a sufficient averment of the jurisdiction of the Court, and the false title of the cause may be rejected as surplusage. *Chapman v. Smith*, 78

4. Charging a person with swearing falsely before a justice, without a colloquium, showing that it referred to a trial, or other legal occasion, is not actionable. *ib.*
5. To say of a woman, *she procured, or took medicine, or poison, to kill the bastard child she was like to have, and she did kill, or poison, the bastard child she was like to have, &c.*, is actionable. *Widrig v. Oyer and wife*, 124
6. Charging the plaintiff with having kept a bawdy-house, is actionable in itself, this being an indictable offence, involving moral turpitude. *Martin v. Stillwell*, 225
7. In an action of slander for charging the plaintiff with having stolen the defendant's shingles, a justification stating that the plaintiff had sold the defendant's shingles without his authority, and afterwards denied that he knew any thing respecting them, without alleging that the plaintiff took them privately, or feloniously, does not amount to a charge of larceny, and is bad as a justification; nor can those facts be given in evidence in mitigation of damages. *Shepard v. Merrill*, 475
8. The truth of slanderous words cannot be given in evidence, under the general issue, without notice, either as a justification, or in mitigation of damages. *ib.*

### SLAVES AND SERVANTS.

An action on the case lies for seducing and harboring the servant or slave of the plaintiff, notwithstanding the penalty given by the act concerning slaves and servants, (2 N. R. L. 206.) which is a cumulative remedy. *Scidmore v. Smith*, 322

### STATUTES.

A statute penal as to some persons, if it is generally beneficial, may be equitably construed. *Sickles v. Sharp*, 497

Penal statute, *vide* ACTION ON THE CASE, 4.  
ACTION ON STATUTE.

### STATUTES CONSTRUED, EXPLAINED, OR CITED.

1786, Feb. 23. *Seas.* 9. c. 12. (Descents,) 261  
1787, Feb. 8. *Seas.* 10. c. 13. (Usury,) 40, 492

|                                                              |                                                                                |
|--------------------------------------------------------------|--------------------------------------------------------------------------------|
| 1787, Feb. 26. Sess. 10. c. 44. (Frauds)                     | 175.                                                                           |
|                                                              | 236. 508                                                                       |
| 1788, Feb. 6. Sess. 11. c. 6. (Forcible Entry and Detainer,) | 168                                                                            |
| 1794, Jan. 8. Sess. 17. c. 1. (Military Lands,)              | 473                                                                            |
| 1797, March 24. Sess. 20. c. 51. (Onondaga Titles,)          | 504                                                                            |
| 1801, Feb. 20. Sess. 24. c. 11. (Apprentices,)               | 270                                                                            |
| —, March 21. Sess. 24. c. 46. (Gaming,)                      | 88                                                                             |
| —, Sess. 24. c. 47. (Pledging,)                              | 443                                                                            |
| —, March 30. Sess. 24. c. 57. (Champerty and Maintenance,)   | 238. 466                                                                       |
| —, Sess. 24. c. 69. (Stealing Bills and Notes,)              | 90                                                                             |
| —, April 7. Sess. 24. c. 164. (Inns and Taverns,)            | 85. 252. 425                                                                   |
| —, April 8. Sess. 24. c. 183. (Limitations,)                 | 288. 510. 552                                                                  |
| 1802, March 19. Sess. 25. c. 44. (Horse-racing,)             | 86                                                                             |
| 1806, April 7. Sess. 29. c. 166. (Dower,)                    | 180                                                                            |
| 1809, March 29. Sess. 32. c. 165. (Militia,)                 | 186                                                                            |
| 1811, April 3. Sess. 34. c. 123. (Insolvent,)                | 214                                                                            |
| 1813, Feb. 25. Sess. 36. c. 4. (Bills of Exemption,)         | 320                                                                            |
| —, March 5. Sess. 36. c. 27. (Inspection of Flour,)          | 331                                                                            |
| —, March 19. Sess. 36. c. 33. (Highways,)                    | 460                                                                            |
| —, Sess. 36. c. 35. (Towns,)                                 | 477                                                                            |
| —, April 2. Sess. 36. c. 48. (Counsellors and Attorneys,)    | 465                                                                            |
| —, Sess. 36. c. 59. (Judgments and Executions,)              | 378. 529                                                                       |
| —, April 5. Sess. 36. c. 53. (Justices' Courts,)             | 185. 191. 210. 218. 327. 328. 349. 352. 328. 350. 430. 460. 462. 481. 503. 517 |
| —, Sess. 36. c. 56. (Amendment of the Law,)                  | 9. 189. 263. 329. 476                                                          |
| —, Sess. 36. c. 58. (Fines,)                                 | 426                                                                            |
| —, Sess. 36. c. 63. (Rents, Distresses, and Attornments,)    | 243. 306. 417. 537                                                             |
| —, April 6. Sess. 36. c. 75. (Distributions,)                | 1                                                                              |
| —, April 8. Sess. 36. c. 78. (Poor,)                         | 245. 270. 390                                                                  |
| —, Sess. 36. c. 79. (Administration,)                        | 437                                                                            |
| —, April 9. Sess. 36. c. 81. (Debtors, Imprisoned,)          | 121. 533                                                                       |
| —, Sess. 36. c. 88. (Slaves and Servants,)                   | 322                                                                            |
| —, April 10. Sess. 36. c. 93. (Heirs and Devisees,)          | 272                                                                            |
| —, April 12. Sess. 36. c. 96. (Costs,)                       | 306. 345. 425. 465. 537                                                        |
| —, Sess. 36. c. 98. (Insolvents,)                            | 385                                                                            |
| —, Sess. 36. c. 100. (Partition,)                            | 439                                                                            |
| 1815, Feb. 17. Sess. 38. c. 38. (Original Writs,)            | 127                                                                            |
| —, April 11. Sess. 38. c. 146. (Fishing in the Hudson,)      | 497                                                                            |

## ST. DOMINGO.

Vide INDEPENDENT STATE.

## STREAM OF WATER.

1. The grant of an undivided moiety, or share in a stream of water, does not authorize the grantee to appropriate or use the stream to

the injury of others, jointly interested in it.  
*Vandenburg v. Van Bergen,*

2. The property in a stream of water is indivisible.

## SUMMONS.

Vide ORIGINAL WRIT, I. 3.

## SUNDAY.

Vide FISHING IN THE HUDSON.

## SURETY.

1. Where a contract has been broken, the surety may pay the money without suit, and recover against his principal. *Masri v. Hefferman,*
2. If an obligee, or holder of a note, who is requested by the surety to proceed without delay, and collect the money of the principal, who is then solvent, neglects to proceed against the principal, who afterwards becomes insolvent, the surety will be exonerated. *Pais v. Packard,*
3. But a mere delay in calling on the principal, will not discharge the surety.
4. In an action against *A.* and *B.*, on their joint note, payable to *C.*, on demand, *A.* pleaded that he signed the note as surety for *B.*, and requested *C.* to proceed immediately to collect the money of *B.*, who was then solvent; but that *C.* neglected to proceed against *B.*, until he had become insolvent, and had absconded, whereby the money, as against *B.*, was lost. On demurrer, this was held to be a good plea in bar of the plaintiff's action against *A.* *Pais v. Packard,*
5. The negligence of the creditor in calling upon the principal, does not exonerate the surety, unless he has been damaged by such negligence. *The People v. Berner,*
6. In an action against the sureties of the commissioners for loaning money of the county of *S.*, for the default of their principals in not paying over money which they had received for interest, it was held, that the sureties were not exonerated by the negligence of the comptroller in not calling upon their principals, after numerous defaults, unless an injury resulted to them from his negligence.

Vide ADMINISTRATION BOND. ASSUMPSIT FOR MONEY HAD AND RECEIVED, 3. BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 10, 11, 12.

## T.

## TAVERNS.

Vide INNS AND INNKEEPERS.

## TENANT AT WILL.

1. A tenancy at will is determined by the landlord's selling the premises. Per *Thompson*, Ch. *J. Jackson*, ex dem. *Phillips*, v. *Aldrich*,
2. The possession of a tenant at will is the possession of the person under whom he holds. *Jackson*, ex dem. *Young and others*, v. *Ellis and White*,
3. An agreement to sell land does not impart a license to enter, but, at most, gives an implied permission to occupy as tenant at will.

Vide EJECTMENT, I. 3.

## TENANT IN COMMON.

Vide EJECTMENT, I. 1. RELEASE, 4.

# TENANT BY THE COURTESY.

*Vide* WASTE.

## TITLE TO PROPERTY.

Where *A.* delivered six sheep to *B.*, on an agreement that at the end of the year, *B.* would deliver *A.* an equal number of sheep, of equal value, it was held that the property in the sheep was changed, and that *B.* was bound to deliver six sheep of equal value to *A.*, at the expiration of the year, although part of the sheep had been taken under an attachment against *A.* *Wilson v. Finney*, 358

Title by capture, *vide* CAPTURE.

Title under judgment and execution, *vide* EXECUTION.

## TOWNS.

*Vide* COMMON SCHOOLS. POOR.

## TRESPASS.

1. Bare possession of a chattel is sufficient to maintain trespass against a wrong doer. *Hoyt v. Gelston and Schenck*, 141
2. *S. P. Gelston and Schenck v. Hoyt*, in Error, 561
3. An admission of the counsel of the plaintiff, on the trial of an action of trespass, that the defendant acted without malice, precludes the plaintiff from claiming vindictive damages, and, therefore, evidence on the part of the defendant, in the nature of a justification of the act, is inadmissible by way of mitigation of damages. *Hoyt v. Gelston and Schenck*, 141
4. *S. P. Gelston and Schenck v. Hoyt*, in Error, 561
5. If a person, having title to land, enter with force, he is not liable to an action of trespass. *Foss v. Foss*, 235
6. Where a horse belonging to the United States was taken by the enemy, and shortly after retaken by the plaintiff, who continued in the possession until it was taken from him by the defendant, an officer in the army of the United States, acting under the orders of a superior officer, it was held, that the plaintiff could maintain an action of trespass against the defendant to recover the value of the horse, no authority from the United States to take the horse having been shown by the defendant; and it is to be presumed, until the contrary be shown, that the United States never intended to interpose any claim to the property. *Cook v. Howard*, 976
7. In trespass *de bonis asportatis*, the defendant cannot show property in a stranger, although it is otherwise in trover. *ib.*
8. Any person is justified in killing a ferocious and dangerous dog, which is permitted to run at large by its owner, or escapes through negligent keeping, the owner having notice of its vicious disposition. *Putnam v. Payne*, 312
9. Any person is justified in killing a dog which has been bitten by another mad animal. *ib.*
10. But whether that would be a justification for killing more useful and less dangerous animals? *Quere.* *ib.*
11. Where a vessel has been seized by an officer of the customs, who, after the seizure, commits an abuse of the authority vested in him, and the vessel is then acquitted in the District Court, but a certificate of probable cause given, the officer, although liable for the particular act of abuse, is protected by

the certificate from being made a trespasser *ab initio*. *Van Brunt and another v. Schenck*, 414

12. It seems, that an action on the case is the proper remedy. *ib.*
13. As to the effect of the plaintiff having taken out of the District Court the money for which the vessel was sold, under an order of the Court made with his consent. *Quere.* *ib.*
14. The abuse of an authority given by law makes the abuser a trespasser *ab initio*, but not the abuse of an authority in fact. *ib.*
15. The approbation of a superior of a trespass committed by his inferior, renders him a trespasser. *ib.*
16. Persons not inhabitants of a town, are not liable to be taxed for the support of common schools in that town, (*N. R. L.* 261.) and if a tax be levied and assessed upon the property of such non-resident, not only the trustees who issue the warrant, but also the collector who executes it, are trespassers. *Sneydam and Wickeff v. Keys*, 444
17. The trustees having but a special and limited authority, the officer is bound to see that he acts within the scope of their legal powers. *ib.*
18. But an officer may justify under erroneous proceedings, where there is no defect of jurisdiction. *ib.*
19. An officer of the revenue seizing goods as forfeited, and causing them to be labelled and tried, in an action of trespass by the owner, can only plead a condemnation, or an acquittal, with certificate of probable cause. *Gelston and Schenck v. Hoyt*, 561

Trespass for taking a distress damage feasant, *vide* DISTRESS.

Trespass for mensu profits, *vide* EJECTMENT, IV.

## TRIAL.

*Vide* NEW TRIAL. PRACTICE, V. SALE OF CHATTELS, 5.

## TOWN.

*Vide* TRESPASS, 5.

## TRUST AND TRUSTEE.

1. *A.*, by his deed, dated the 16th of January, 1799, conveyed a lot of land to *B.*, (reciting a contract of purchase between *A.* and *M.*, dated the 23d of August, 1797, by which *M.* covenanted to pay one fourth of the purchase money on the 23d of August, 1799, &c., and agreed, that if he failed in performance, *A.* was to be discharged from making a conveyance,) in trust, to convey the premises to *M.* or his appointee, when he should have made the payments, and performed the covenants stipulated in his contract. *A.*, by *B.*, his attorney, covenanted, the 23d of September, 1799, to convey part of the lot to *S.*, who paid part of the purchase to *B.*, and the residue to *A.*, who conveyed the premises to *S.*, by deed, dated the 14th of November, 1801. *M.* having failed to perform his contract, *B.*, by a deed, (dated the 29th of September, 1812, and executed by virtue of a power from *A.*, dated the 16th of December, 1799,) reciting that *A.* had assigned the contract of *M.* to *C.*, in trust, for the executors of *C.*, conveyed the premises in question to *C.* It was held, that *S.* had a good title under his deed, notwithstanding the previous contract with *M.*, and the deed to *B.*, as *M.* having

failed to perform his contract, the trust in *B.* was at an end, and resulted to *A.*, and *B.* had no authority to execute a deed afterwards, without a new power.

That *A.* and *B.* having, subsequently to the deed of trust, made the agreement with *S.*, which had been carried into effect, it was a revocation of the trust as it regarded *S.*, and that the subsequent deed to *C.* was inoperative, on the ground of the adverse possession of *S.* *Short v. Wilson and others*, 33.

2. Where *A.* confesses a judgment to *B.*, and *B.* covenants to sell the property of *A.* under that judgment, and apply a sufficiency of the proceeds to the payment of *A.*'s debts, and account with him for the remainder, *B.* may himself become a purchaser, at a sale, under an execution issued on such judgment, for the legal and equitable title in the property remaining in *A.*; until the sale, *B.* is not a trustee as to that property, nor is *B.* accountable to *A.* beyond the sum for which the property was sold to him. *Sheldon v. Sheldon and others*, 290.

3. Whether the rule prohibiting trustees from becoming purchasers of the trust estate extends to public sales on execution? *Quere.* *ib.*

4. Where a person takes a deed for land in his own name, but the consideration is advanced by another, a trust results in favor of that other person, which may be proved by parol. *Jackson, ex dem. Whitlock, v. Mills*, 463.

5. Trust estates pass under general words in the will of the trustee, relating to the realty. *Jackson, ex dem. Livingston, v. Delancy*, 537.

Presumption of conveyance by trustee, *vide* EVIDENCE, III.

## U.

### USAGE OF TRADE.

Usage of trade is, in general, inadmissible to show that a transaction was not usurious. *Dunham v. Dey*, 40.

### USE AND OCCUPATION.

1. An action for use and occupation lies where the holding is upon an implied as well as an express permission of the landlord. *Osgood v. Denney*, 240.
2. A tenant, who, after the expiration of, and payment of rent under, a parol demise, continues in possession without any new agreement with the landlord, cannot, in an action against him for the use and occupation of the premises subsequent to the expiration of the former term, dispute the title of the plaintiff, and his subsequent holding will be deemed to have been by the implied permission of the original lessor. *ib.*
3. An action of assumpsit for the use and occupation of land will lie against a lessee by deed who holds over after the expiration of the term. *Abuel v. Radcliff*, 297.
4. And such action lies against a tenant holding under a covenant contained in the expired lease for a renewal. *ib.*
5. An action for use and occupation can only be maintained where the relation of landlord and tenant exists between the parties; and it

will not lie against a third person, who has come in under the plaintiff as a purchaser from him. *Bancroft and wife v. Wardwell*, 489.

## USURY.

1. Where *A.* receives *B.*'s note, on giving *B.* his note at 10 days, for the purpose of raising money on *B.*'s note, and pays *B.* two and a half per cent. commission, this is a loan within the statute of usury, and *A.*'s note is usurious and void. *Dunham v. Dey*, 40.
2. Evidence that it was the usage of trade to take two and a half per cent. commission on the exchange of paper is inadmissible; for usage is of no avail, if the transaction comes within the meaning of the statute. *ib.*
3. It seems, that a person may lawfully receive a commission for becoming security for another. *ib.*
4. It seems that the practice of the banks of issuing post notes, is not, in itself, usurious. *ib.*
5. A note was drawn payable to *A.* and *B.*, which was held by *C.*, who wished to sell the note to *D.*, but *D.* refused to take it, unless endorsed by *A.* and *B.*; *A.* refused to endorse it unless he received security for his indemnification, which it was agreed to give, and the note was sold to *D.* at a discount of 20 per cent. It being understood between *B.* and *C.* that part of the money thus raised should be lent to *B.*, *B.* drew a note payable to *C.*, or bearer, for the amount actually received by him from *C.*, with an addition of 20 per cent. on that amount, and interest thereon from the date, which last-mentioned note was deposited with *A.* as his security; in an action by *A.* against *B.* upon this note, it was held, that it was usurious and void. *Yordan v. Hess*, 492.

## V.

### VARIANCE.

*Vide* PLEADING, VIII.

### VENUE.

*Vide* PRACTICE, III.

## W.

### WAGER.

*Vide* PLEADING, 1, 2.

### WARRANTY.

*Vide* FRAUDES, (STATUTE OF,) 3.

### WASTE.

An action of waste does not lie by the heir, against the assignee of the tenant by the courtesy, but only against the tenant himself. *Bates v. Schroeder*, 260.

*Vide* ACTION ON THE CASE, 1.

### WRIT.

*Vide* PRACTICE, I.

### WRIT OF RIGHT.

Fees of electors of grand assize, *vide* COSTS, I. 1.

(WRIT, ORIGINAL.)

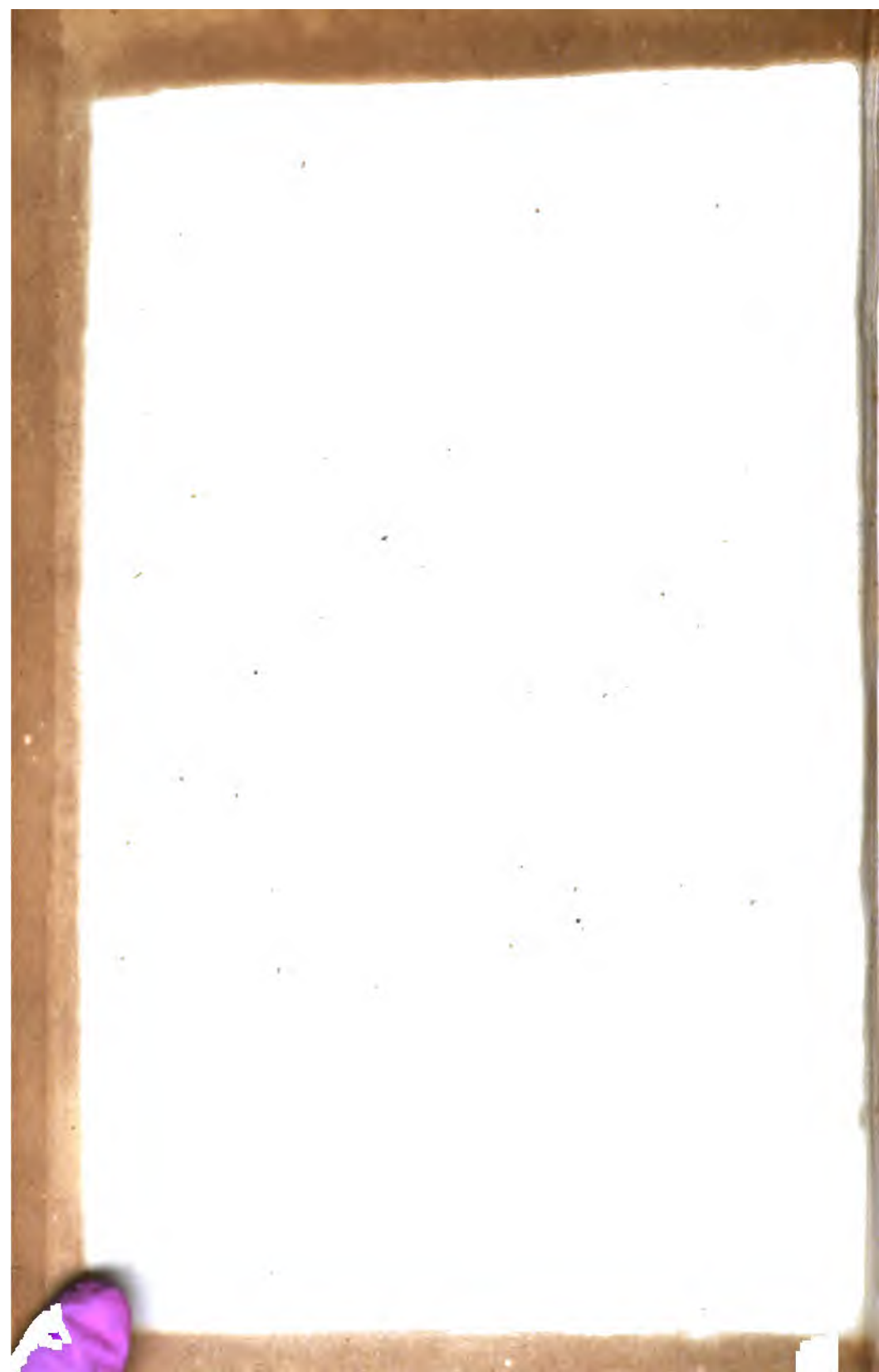
*Vide* ORIGINAL WRIT.











Stanford Law Library



3 6105 063 584 978